United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

76-7083

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No.76-7083

FREQUENCY ELECTRONICS, INC.,
Plaintiff-Appellee

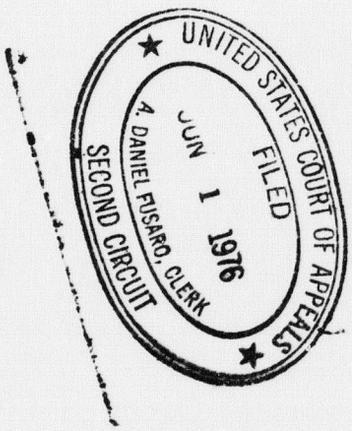
-against-

NATIONAL RADIO COMPANY, INC.,
Defendant

-and-

LOUIS LERNER
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT
OF NEW YORK



RECORD APPENDIX

- VOL. II -

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ebrf

Frequency Electronics, Inc.

vs 72 Civ. 412

National Radio Company, Inc. and
Louis Lerner

New York, New York
June 10, 1975 - 11:00 a.m.

(Trial resumed.)

THE COURT: Will the witness please return to the stand.

M A R T I N B L O C H, resumed the stand and testified further as follows:

CROSS EXAMINATION

BY MR. SCHREIBER (Continued):

Q Mr. Bloch, we were discussing yesterday that letter that was written by National to Hewlett-Packard complaining of infringement. I am speaking of the letter prior to the February '69 closing, and I believe you testified --

THE COURT: Please don't summarize his testimony. Just continue the cross examination. I am sure he remembers what he testified to.

MR. SCHREIBER: Thank you.

Q Do you recall now whether at any time you ever saw that letter?

A I am not sure if I saw it or I was specifically told about it.

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THE COURT: He means ever, before or after the closing. Have you ever seen that letter?

THE WITNESS: No. I don't recall.

Q Is it no or you don't recall?

A I don't recall.

THE COURT: Did you ever talk with anybody at Hewlett-Packard about this situation?

THE WITNESS: Hewlett-Packard wouldn't communicate with us as soon as we found out that they were interested in the line.

THE COURT: Did you ever speak to anybody at Hewlett-Packard about this before closing?

THE WITNESS: No. We couldn't even tell them the details of what we were after.

THE COURT: You don't have to give a speech. Just try to give as simple an answer as you can.

Q At page 73 of your pretrial deposition, Mr. Bloch, which was held on April 20th, 1972, you testified with regard to that letter, and I quote:

"Q Do you know whether National brought any such suit?

"A I don't know.

"Q Did you ever inquire?

"A Yes.

"Q Of whom?

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"A From the National representatives.

"Q What did you learn?

"A That a letter was sent but I never saw the letter."

Does that refresh your recollection as to whether or not you ever saw the letter?

A No, Mr. Schreiber. I am not sure if I saw it or was specifically told about it.

Q At page 100 of your pretrial deposition, this on February 24, 1975, you testified:

"Q Mr. Bloch, did you ever hear about the content of the letter that was referred to having been sent to Hewlett Packard?

"A I saw the letter at National Company on one of the visits but I have never gotten a copy of it or examined it in great detail.

"Q And you saw that letter prior to the contract of February 1969?

"A Definitely. Sometime in 1968.

"Q Will you tell me what was said in that letter?

"A It was a short letter. As I recollect, a summary of -- to cease and desist manufacturing of the cesium beam or something of that nature.

"Q Did it say anything about who owned the patent on that?

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"A I don't recall.

"Q Do you know who signed that letter?

"A No, I don't recall whose signature was on it.

"Q Do you recall if it was signed by Clarence Lyon?

"A No, I don't.

"Q Do you recall whether it was signed by someone on behalf of National Radio?

"A I don't recall who signed it.

"Q Do you know to whom it was addressed?

"A To Hewlett-Packard Company."

I stop my quote at this point.

Mr. Bloch, does that refresh your recollection as to whether or not you saw the letter at any time?

A It is not clear in my mind. It is advised that I knew the contents and I'm not sure if I saw the letter or not.

Q But you knew the contents without seeing it?

A I testified yesterday during the discussion this was made clear on the meetings and there were many people at the meetings and I just don't in all honesty recollect if I physically saw the letter or the contents were conveyed to me that clearly.

Q Now after the February 3, 1969 closing, Mr. Bloch, did you ask for a copy of that letter from anybody?

A No.

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Q Did you ask anybody to turn over the file containing that letter, or any letter referring to claims against Hewlett-Packard?

A We were turned over approximately 20 transfer files, and we were going through and putting them all in order before we could ask, we wanted to know what we received.

Q And having put them in order and found out what you had received, did you find that you had received a copy of that letter?

A Well, prior to organizing all those files, we already made arrangements with Clarence Lyon to pursue the Hewlett-Packard infringement so it became of secondary importance.

Q My question, Mr. Bloch, is having put the files in order, did you find that you had or had not received a copy of an earlier letter preclosing letter to Hewlett-Packard?

A Mr. Schreiber, we never put those files in order. They were so voluminous --

Q Did you ever find a copy of a letter?

A No.

Q Earlier letter to Hewlett-Packard?

A No.

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Q Now, you say after you got the files and started to put them in order, you retained Clarence Lyon?

A I talked to Clarence Lyon and asked him if he will represent us.

Q When was that?

A Within a couple of months after February 3rd.

Q Had you previously discussed that with him?

A No. To the best of my recollection, no.

Q So the first time you discussed it with Clarence Lyon, his representing Frequency to make claim against Hewlett-Packard, was sometime, some few months after the closing?

A Mr. Schreiber, I don't recall in all honesty. I talked to Mr. Clarence Lyon with respect to sending the patents and I don't know if I asked him would he represent us if we concluded the purchase of the Atomichron or not. I don't recall.

Q That was before the closing?

A I had one conversation with Mr. Lyon with respect to getting copies of patents.

Q And do you recall whether in that conversation you asked Mr. Lyon to represent you in pressing a claim against Hewlett-Packard?

A I don't recall. It is possible.

Q Do you recall whether in that conversation you asked Mr. Lyon anything about the Zacharias Patent?

A I asked specifically for a copy of the Zacharias Patent.

Q You so testified yesterday?

A Yes.

Q Did you ask him anything about the validity of the Zacharias Patent?

A No.

Q Do I understand, sir, that you may have discussed with him his willingness to represent Frequency in a claim for infringement of the Zacharias Patent but you didn't discuss with him whether or not the Zacharias Patent was valid?

A I didn't have a long discussion with him. It must have been a one minute conversation. I primarily wanted a copy of the patent and I believe Mr. Whitney Drake asked me to call him. I'm not sure about that either. I don't know how I got to Clarence Lyon. I never met him prior to the closing.

Q I read from your testimony, Mr. Bloch, taken February 24, 1975, starting at page 112.

"Q You said you had a telephone conversation with him?

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"A That was someplace in toward the latter part of 1968.

"Q Will you tell us who initiated that call?

"A To the best of my recollection, it was by me personally. And it was with respect to specific patents and specifically the Zacharias Patent."

I skip some colloquy between counsel. And I skip a question and an answer that are not relevant.

"Q In your telephone conversation?"

MR. GOLDMAN: Would you state what line and page you are now on.

MR. SCHREIBER: I am now on page 113 at line 6:

"Q Your belief is that it was prior to your receipt of Lyon 2, or Plaintiff's Exhibit 1, that you called Mr. Lyon?

"A To the best of my recollection, there was no subsequent conversation after this memo with Clarence Lyon on any subject.

"Q In your telephone conversation with Mr. Lyon, Mr. Bloch, did you tell Mr. Lyon that Frequency was interested in buying this package? It was ultimately covered in the February contract.

"A I believe so.

"Q Did you tell him specifically that you were

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buying the atomic beam frequency standard?

"A If that is what you refer to as the package, it was this cesium beam equipment and invention. Everything covered under the purchase.

"Q And you told him that in the conversation?

"A I believe so.

"Q Did you have any discussion with him in that telephone conversation as to what Mr. Lyon had done in connection with the patent applications on behalf of National covering the cesium beam frequency standard?

"A No.

"Q Did you ask him anything about the validity of those patents?

"A I don't recall, but I would probably have not. I had no reason to ask that. I primarily recall asking for specific copies and numbers of the Zacharias Patents. And I am just trying again to look in my memory did I discuss in any way the previous letter to Hewlett-Packard but I couldn't swear to that."

On page 114, and I have already reached line 15:

"Q This was after you were getting somewhat upset about the failure to receive a copy of that Hewlett-Packard letter, is that right?

"A And also there were some delays in getting

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copies of patents which National promised to forward to us.

"Q In the Hewlett-Packard letter, as you recall, as previously testified, it had to do with Hewlett-Packard investigation of the patent rights of the cesium beam frequency standard?

"A Specifically, right.

"Q In your telephone call with Mr. Lyon, you didn't ask him about the validity of that patent?

"A I had no reason to. I wanted to know about that letter and about getting copies of patents and any interrelated patents.

"Q Is that all you called Mr. Lyon for, to get copies of patents and interrelated patents?

"A And with National's consent, would he represent us after the purchase?

"Q You had already asked him in 1968 whether he would represent you after the purchase to take place in February 1969?

"A Well, at the present time we didn't expect it to go to February, 1969. We expected it to be concluded in December.

"Q But in any event, you were anticipating your need for the services of his office after the conclusion of the deal?

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"A Yes.

"Q For what purpose?

"A To pursue the Hewlett-Packard patent infringement."

Now I end my quote here.

After the closing, Mr. Bloch, I believe you testified that some months later you contacted Mr. Lyon again to press the Hewlett-Packard claim?

A Yes.

Q Do you know whether Mr. Lyon first wrote any letter to Hewlett-Packard concerning that claim?

A About a year later.

THE COURT: A year later than what?

THE WITNESS: Then when I first contacted him.

THE COURT: When was that?

THE WITNESS: Sometime within, let's see, February 3rd, it must have been in May, June or early July.

Q Specifically, Mr. Bloch, was that letter written on June 19, 1970, some 16 months after the closing?

A I said a year later after I contacted him, Mr. Schreiber.

Q During this period between the closing and June 19th of 1970, when Mr. Lyon first wrote to Hewlett-Packard about the infringement, did you do anything to prod Mr. Lyon into greater activity?

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A Yes.

Q What did you do?

A Mr. Lyon was handled not directly through Frequency Electronics but he was handled through the office of Pryor Cashman, and I had at numerous times called our lawyer to push Mr. Lyon into sending that letter, that letter to Hewlett-Packard, and the answer that I got is that he is working on it and he is going to get it out as soon as he can.

THE COURT: This letter we are talking about is the demand letter?

MR. SCHREIBER: The first demand letter of which we were able to find a copy, the cease and desist letter that was written in June of 1970.

THE WITNESS: On behalf of Frequency.

MR. SCHREIBER: On behalf of Frequency.

Q I will read from Mr. Bloch's testimony again of February 24, 1975.

THE COURT: Can we shortcut this. If you give me an offer of proof of what is in there that might be helpfil. Are you just reading this for impeachment?

MR. SCHREIBER: I can give you an offer of proof, your Honor, and I think it is a suggestion I would like to follow.

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Q Mr. Bloch, did you not testify at your deposition that you were content to wait until June of 1970 for Mr. Lyon to write the letter because he was making an investigation and you felt that an investigation should be made and thoroughly made before any letter was written?

A No, I was not content, Mr. Schreiber.

MR. GOLDMAN: Your Honor, can I have Mr. Schreiber state the portion of the deposition that his offer of proof is based upon?

THE COURT: Well, you see, he has asked a question and the witness has answered negatively so now he may confront him with any prior testimony. I am merely trying to save time. If the witness takes a position which the examiner considers inconsistent with the position on the deposition then he may confront him with the deposition. It looked to me that he was being read a deposition without having been asked the underlying question. That is why I asked him to proceed differently.

Q Did you receive any explanation from Mr. Lyon as to why it was taking so long?

A I testified a minute ago that I talked to our lawyers and they supposedly pushed Mr. Lyon to get a summary of what is happening.

Q Do you know what explanation they got from Mr.

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Mr. Lyon?

A That he is working on it and he is going to do it.

Q Did you consult Mr. Amster or anybody at the Amster firm to see whether the matter could be handled more expeditiously by someone else?

A No, Mr. Schreiber.

Q During this period, from closing in February of 1969 up until June of 1970, was Frequency producing the atomic beam frequency standard?

A What was the period of time again?

Q From the time of closing up until the time Mr. Lyon wrote his June 1970 letter were you producing the Atomichron?

A By producing, do you mean were we selling it?

Q Making and selling.

A I would have to take a look at our technical logs. We spend a year approximately 22 hours a day trying to get that product line developed and packaged and I don't recall when the first sales were made. They weren't made before, to the best of my knowledge, before the middle of 1970.

Q Before mid-'70 you had no sales of the Atomichron?

A That is typical. It takes a year to develop.

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MR. GOLDMAN: Mr. Schreiber, would you let the witness finish his answer.

THE COURT: No cross currents here. Anyone wanting to say something speak to the Court directly.

Am I correct in understanding that this company was making this device before you purchased it?

THE WITNESS: Yes, your Honor. EXcept that when we purchased the material, we knew even before that their designs were plagued with problems and they were quite old, and when we started we started completely the redevelopment of the atomic frequency standard and there are approximately 30 individual modules each the complexity of at least a television set that had to be designed, developed, packaged and fabricated before we could offer the instrument for sale.

THE COURT: And you knew that before February of 1969?

THE WITNESS: We knew it before we purchased. We weren't interested in the National designs. They were old, they used old technology, and frequency and time control electronics expertise and it is difficult. It takes about a year and a half to develop a product before offering it to sale.

THE COURT: And nothing was made of the old products in the meantime?

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THE WITNESS: We didn't use any of the old products in the meantime.

Q Did you sell any of the completed -- did you receive any completed Atomichrons in connection with the transaction?

A No.

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THE COURT: While you are looking for papers I would like to note that as far as defendant Lerner, plaintiff's requests for admissions directed to defendant Lerner, the original of that has not been discovered in the clerk's files, so would you look in your own files and see if you might not have it. If not, let's get an agreed copy and have it marked.

MR. GOLDMAN: We will, your Honor.

MR. CARR: Is the response in the file, your Honor?

THE COURT: Yes, the response is in the file. The response was apparently gotten December 27, 1974.

MR. EBENSTEIN: Your Honor, the request for admissions accompanied a stack perhaps two or three inches high of documents. It may be in a separate file or something in the clerk's office.

THE COURT: We will continue looking for it but before this trial is over you are responsible for getting it in there.

MR. EBENSTEIN: Yes, certainly.

MR. SCHREIBER: I believe trial Exhibit 1, already marked in evidence, is the purchase-and-sale agreement.

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BY MR. SCHREIBER:

Q I show you Trial Exhibit 1, Mr. Bloch, and I refer you to Exhibit A annexed thereto, which lists inventory of components, equipment, raw material, and documentation realting to the Atomichron, and that list consists of some three and a half pages and some 88 separate items, and I call your attention to item 1 --

A Would you tell me which page you are on, Mr. Schreiber.

Q Page 1 of Exhibit A.

A Page 1 of Exhibit A.

THE COURT: Attached to Exhibit 1 in evidence.

Q To Exhibit 1 in evidence. That's right. Item 1 is seven NC3501 Atomichrons. Were those completed Atomichrons?

A They weren't.

Q Were they the same Atomichrons that National had been selling previously, the NC3501?

A I believe so.

Q In what respect were they not complete?

A They were nonfunctioning.

Q What do you mean by that?

A They didn't do the job they were supposed

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to do.

Q Well, did they work? You mean they weren't sufficiently accurate? In what respect were they not doing the job?

A Mr. Schreiber, they weren't functioning.

Q Tell us what you mean by that. We are only lay people, Mr. Bloch.

A Functioning is when an instrument performs and meets the specifications. Many of them were missing modules. Many of them were plagiarized for other developments at National. None of the Atomichrons that we received were functioning and were salable items.

Q Did you ever sell any of these?

A No.

Q The next item shows 80 NC6201-G3B.T. complete. Were those Atomichrons?

A No.

Q What were they?

A They were cesium beams. They were tubes.

Q Just tubes?

A That's correct.

Q Now, your recollection is that your first sales of Atomichrons were some time after mid-1970.

A Some time in 1970, Mr. Schreiber.

Q I show you Frequency Electronics' annual report for the fiscal year 1969 and call your attention to the shareholders letter written by you.

THE COURT: What is the exhibit number?

MR. GOLDMAN: It is not marked, your Honor.

THE COURT: Nothing is to be shown to the witness until it is marked for identification.

MR. SCHREIBER: Which I offer in evidence as part of the form 10K filed with the Securities and Exchange Commission for the fiscal year ended April 30, 1969.

THE COURT: What is the number of it?

MR. SCHREIBER: It is marked Defendants' Exhibit 1A.

MR. GOLDMAN: I don't know what that reference is to, your Honor. It is not in the pretrial order and to my knowledge it's not been premarked.

MR. SCHREIBER: We will offer it.

THE COURT: You are not going to offer it unless you can explain its absence from the pretrial order. This case has to move along, gentlemen. This cross examination is taking a long time and going nowhere.

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MR. CARR: Can I interrupt?

THE COURT: Yes, sure.

MR. CARR: When I met with Mr. Goldman, I said to Mr. Goldman that I wanted to have something in the pretrial order which would reference the exhibits in the deposition, and he said that he would make some reference in the pretrial order of documents marked in the deposition, and this was marked in Mr. Block's deposition.

THE COURT: What is it offered to show.

MR. CARR: It is offered to show --

MR. GOLDMAN: I didn't say that just for the record.

MR. SCHREIBER: It is offered to show sales of 12 atomic frequency standards in the fiscal year 1969.

THE COURT: All right. Mark it and show it to the witness and ask him whether it is a fact that during that particular fiscal year they sold 12 of these devices as therein set forth and then go on to something else.

Now, do you want to be heard?

MR. GOLDMAN: Yes, your Honor. I simply want to point out that Mr. Bloch's testimony related

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to the year 1970 and there has been no basis for establishing when the fiscal year of the company, the 1969 --

THE COURT: Are you making an objection?

MR. GOLDMAN: Not yet, your Honor.

THE COURT: Then sit down.

MR. GOLDMAN: I reserve my position.

THE COURT: You don't reserve anything. If you have an objection you make it and I will rule on it. If you don't have an objection, don't make speeches. And that goes for everybody here.

MR. GOLDMAN: I have no objection at this time.

THE COURT: You have no objection, period. None of this at this time, period. And when you are talking on the record in this courtroom, you stand.

MR. GOLDMAN: I apologize, your Honor.

THE COURT: All right. Let's get with it, gentlemen, all of you.

All right, Mr. Schreiber, now let's move along.

(Defendants' Exhibit L was marked for identification.)

THE COURT: Show it to the witness and ask

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him the question.

BY MR. SCHREIBER:

Q Does that refresh your recollection, Mr. Bloch, as to whether there were any sales in 1969 of the Atomichron?

A There were no sales, Mr. Schreiber.

Q I quote from the exhibit:

"We are highly encouraged by the recent award of our first production contract for 12 atomic frequency standards aggregating approximately $200,000 and we anticipate other production contracts for this equipment during the current fiscal year, both for military and commercial use."

The preliminary part of that paragraph, which is dated August, 1969, says:

"The most exciting development during fiscal 1969 was the acquisition of an atomic frequency standard product line from National Radio Company known as the Atomichron."

Were the 12 atomic frequency standards referred to in this sentence Atomichrons?

Q By "Atomichrons" are you talking about the National design or the Frequency design?

Q Based upon the device acquired from National,

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whether or not modified by frequency.

A They were atomic frequency standards, yes.

Q Using the cesium beam tube?

A Yes.

Q Using the Zacharias patent?

A Absolutely.

Q Thank you.

THE WITNESS: Your Honor, can I --

THE COURT: You will have an opportunity to have redirect examination.

THE WITNESS: Okay.

Q Mr. Bloch, do you remember when Hewlett-Packard applied to the June 19, 1970 letter?

THE COURT: All right, do you remember when they answered it? Is the date what you are trying to elicit.

Q Was it in September of 1970?

A I didn't understand the question. I got a summary of that letter some time in late summer or early October.

Q At that time was Frequency producing the standard?

A Yes.

A Yes.

Q After receiving that reply did you request Mr. Lyon to prepare a definitive opinion?

A Yes.

Q And did he submit to you a definitive opinion?

A In March of the following year, yes.

Q And that opinion said what?

A That to the best of his investigation he is convinced that the patent is not valid.

Q The Zacharias patent?

A That is the only patent --

Q That's not the only patent. There 19 patents.

THE COURT: Don't argue with the witness.

MR. GOLDMAN: Your Honor, he didn't let the witness finish.

THE COURT: I thought the witness had finished.

Q Thereafter did you attempt to get Mr. Amster to confirm?

A Yes.

Q And Mr. Amster did confirm when?

A In April.

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A In April.

Q Was that in July of '71?

A Mr. Schreiber, please let me answer.

Q I'm sorry. I didn't mean to interrupt you.

A You did.

THE COURT: Don't argue, gentlemen. Isn't this beyond dispute, Mr. Amster did confirm Mr. Lyon's opinion, and isn't the date of it set forth in an exhibit.

MR. SCHREIBER: It is your Honor.

THE COURT: So what is the purpose of the inquiry?

Q In July of 1971, Mr. Bloch, were you still producing atomic beam frequency standards?

A No.

Q When had you ceased?

A In May.

Q Of 1971?

A That's correct.

Q Why did you cease the production?

A I got the summary from Mr. Lyon. I then had to have reverification by Mr. Mort Amster in mid-April ocnfirming the results that the patents, according

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to his investigation opinion, were definitely not valid.

Frequency at the present time had spent a quarter of a million dollars to build 30 cesium beam bubes and, not having patent protection, we decided not to go ahead, and that's the recommendation I made to the board of directors.

Q Your recommendation was based upon the fact that you had no patent protection?

A Primarily.

Q Any other reason?

A I testified, and I would be happy to say there were ingredients. We had to commit major additional funds at that time to build -- the cesium apparatus can't be built one at a time. It has to be built in large lots for -- we had to spend a quarter of a million dollars just to build the cesium beam tubes. Without patent protection I didn't feel in any way we had the possibility of competing against Hewlett-Packard.

Q With that patent protection youi could have continued to use the Zacharias patent, could you not?

A Absolutely.

Q Do I understand that your fear was that Hewlett-Packard would also use it and would successfully

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compete against you?

A With Hewlett-Packard or for a $400 million corporation I would not fecommend for Frequency to proceed if we didn't have patent protection in two ways: that only we can use it and we can either stop Hewlett-Packard from using it or have them pay a royalty which would give us a significant income.

Q So that as we discussed before, it was essential that you be able to either stop Hewlett-Packard or get a royalty from them, or else the Atomichron line was of no use to you?

A That's correct.

Q Did you tell your shareholders that that was the reason why you were stopping the production?

A I believe I did in a stockholders meeting.

Q Do you have any written indication of that?

A No.

Q The Frequency annual report, is that the only communication to your shareholders in writing?

A I believe there is -- whatever lawyers send out with it.

Q Like a proxy statement?

A And a notice of annual meeting. All that is necessary.

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Q In your annual report to your shareholders covering the year 1971 did you indicate the reason why you had ceased producing the Atomichron?

A If I may see it. I don't recall.

MR. SCHREIBER: I offer Frequency's annual report of 1971.

MR. GOLDMAN: That's not marked either, your Honor.

THE COURT: What is it offered for.

MR. SCHREIBER: To show that the reason attributed by Mr. Bloch in September of 1971 for ceasing --

THE COURT: You see, the only possible reason for taking this is for impeachment purposes.

MR. SCHREIBER: That's precisely why.

THE COURT: And it seems to me that you could save a lot of time by saying isn't it a fact that you told the shareholders such-and-such and not make a 15-minute production out of it. All of this can be marked for identification as an exhibit to be used for impeachment purposes only. You may confront the witness with whatever he said therein and then please do so and go on to something else.

BY MR. SCHREIBER:

Q Mr. Bloch, is it not the fact that you told

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the shareholders that the reason that you were stopping production of the Atomichron was because sales resulting from the product had not been as fruitful as originally anticipated?

A I would like, if I may read the whole paragraph one sentence so I can understand it and --

Q Is it not the fact that you reported to your stockholders on the date September, 1971 the following:

"As previously referenced, certain company-sponsored research and development programs have been terminated, the most significant of which is cesium beam frequency standard relating to the Atomichron. Sales resulting from this product have not been as fruitful as originally anticipated. Consequently, the product line of our Atomichron subsidiary has been integrated into the parent company and no further research and development efforts will be expended at this time. However, Frequency Electronics will continue to sell the frequency beam, the cesium beam frequency standard previously developed. This decision was necessitated since the operating loss of the Atomichron was $381,124 and further research and development could not be supported. Consequently a writeoff of the

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costs as an exyraordinary item attributed to research and development inventory and patents in the amount of $778,995 resulted in a total loss of $1,160,119, exclusive of income tax, and is included in the total net loss."

Is that the report you gave to your shareholders?

A Yes, and this is -- doesn't in any way conflict with my present testimony, to the best of my knowledge.

We didn't have any sales, Mr. Schreiber, by the way, in 1969. The first sale to us by definition is when an instrument is delivered to a customer, and we didn't deliver any instruments until 1970, until the year 1970.

In addition, our sales did suffer because we could not slow down Hewlett-Packard,and they were our primary competitor, and when you are trying to complete with a $400 million organization you have to have something to compete with. Without having the prime patent that could stop them, slow them down, or give us an enormous income in royalties, our sales would suffer because Hewlett-Packard's admission that they are using our patent would not only give us

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an income in money, it would be the best advertisement that we could possibly have for the product line and encourage enormous sales.

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MR. SCHREIBER: I move to strike so much of the answer as follows the word "yes."

THE COURT: I will deny the motion in the interests of saving time.

Q Mr. Bloch, did you report to your directors that the reason for ceasing production of the Atomichron was cash flow problems and financial reverses?

A Yes.

Q Did you report to your directors anything to the effect that the reason for ceasing production had to do with patent questionability?

A Yes.

Q Was that reflected in any way in your minutes?

A I'm not sure. Probably the conclusion would be reflected rather than all the detailed discussion of a board meeting.

Q That is just the conclusion to cease producing the Atomichron rather than the reasons why?

A All the underlying reasons why we have not been able to sell and generate cash flow.

THE COURT: You know, I don't understand how a 5 per cent royalty on an $18,000 machine would slow down Hewlett-Packard. It seems to me they could

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pay the royalty with no problems at all and you'd get 4/5ths of it, as I understood your testimony yesterday.

THE WITNESS: Yes, your Honor. Taking a look at the apparatus, that would have given an income of approximately a million and a half to Frequency Electronics, which we would have to share with National Company 50-50. So that would have given us close to $800,000 of money, which is a lot of money for a company of our size.

THE COURT: It wouldn't have helped you sell your own product in a competitive market?

THE WITNESS: Yes, your Honor, because the key -- Hewlett-Packard is considered the principal in the electronics industry on the quality of their product. The idea that they would have to state in every one of their sales and their manuals that this is due to a Frequency Electronics license would be of enormous value in establishing credibility for our new product line. We have successfully done this with quartz standard against Hewlett-Packard in the same manner.

Q Did you report to the Securities and Exchange Commission as to why Frequency was ceasing pro-

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duction of the Atomichron? Is it not the fact that you reported --

THE COURT: The court assumes he filed all the reports he was required to file.

Q Is it not the fact that you reported that the reason for ceasing production was cash flow problems and reverses without mentioning anything about patent insufficiency?

A Whatever is recorded there stands on its own.

Q My question to you is, what is your recollection, did you ever tell the SEC that there was any patent problem?

A I don't recall. I don't file those reports. I give the information to the secretary and the board of directors and they to their best ability put a summary of what is necessary to report.

Q And then you sign the reports?

A I do.

(Defendant's Exhibit M was marked for identification.)

MR. GOLDMAN: That is the annual report for what year?

THE CLERK: 1971.

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MR. GOLDMAN: Thank you.

Q At page 61 of your deposition, taken April 20, 1972, line 9:

"Q You testified, Mr. Bloch, that the reason you abandoned the Atomichron line and wrote off the amounts which you say caused you damages in excess of a half million dollars was because you learned that the patents were not valid?"

MR. GOLDMAN: What page is that?

MR. SCHREIBER: Page 61, lines 9 through 13. The question continues at line 19.

"Q Is that the only reason you abandoned production of the Atomichron line?

"A The major and most significant.

"Q What other reason, if any?

"A Without our patent position it would be very difficult to compete against an existing manufacturer.

"Q Any other reason?

"A No."

Do you recall that testimony?

A Yes.

Q That was accurate, of course?

A I recall the testimony and it is accurate.

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Q At that time, when you ceased production of the Atomichron, was Frequency having problems on its loan?

A No.

Q For Massachusetts Mutual Life Insurance Company?

A No.

Q Had it maintained the working capital as required by its loan agreement from Massachusetts Mutual?

A When specifically are you asking, Mr. Schreiber?

Q At the time you ceased production of the Cesium beam frequency standard.

A When we did the writeoff? Is that in April of 1971? Is that when you are referring to?

Q That's right.

A When we made the writeoff, we didn't meet the loan capital requirements, correct.

Q And Massachusetts Mutual --

THE COURT: Is that what caused you not to meet it?

THE WITNESS: That's correct.

Q For that reason you ceased production?

A I don't understand your logic. I'm default-

ing a loan by writing it off and that's why I would cease production?

Q Did you thereafter cease to put money into the cesium beam frequency standard because you further diminished your working capital?

A No, that's not correct.

Q Did you thereafter obtain an agreement from Massachusetts Mutual to reduce the working capital requirement of your loan agreement?

A No.

Q Was it not reduced from 1.5 million to $750,000 in 1972?

A It was not an agreement, it was a waiver given each year.

Q And it was waived down to $750,000?

A I don't remember the exact number.

Q But you recall a reduction, do you not, in the working capital requirement?

A For each year, right.

Q Thank you.

After you ceased production of the Atomichron did you keep the hardware conveyed to you in February of 1969, the list of items?

A A lot of junk has been thrown out but most

of it is there.

Q You didn't return anything to National, did you?

A Why would I go through -- no.

Q You retained and still have the name Atomichron?

A I believe so.

Q Did you hire any of National's people at the time of the acquisition in February, 1969, that is, people formerly employed at National?

A Yes.

Q Some of them still work for you?

A I don't recall. There is one -- I don't know if he was a National employee.

Q Mr. George?

A Jim George, he works for us on a part-time basis, yes.

Q Was he formerly a National employee?

A Not at the time of the purchase.

Q Had he been employed at National?

A Yes.

Q On cesium beam work?

A Yes.

Q The 18 patents, other than the Zacharias

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patents that were conveyed February 3, 1969, are still owned and retained by Frequency?

MR. GOLDMAN: May I hear that question again, please?

Q The remaining patents, the other 18 patents, conveyed February, 1969, are still held by Frequency?

A I don't know the legality. I presume so.

Q Now, Mr. Bloch, did you ever tell anybody that you regarded the Zacharias patent as the key patent without which Atomichron couldn't be produced?

A Yes.

Q To whom did you tell that?

THE COURT: Would you fix a time, please?

Q At any time.

THE COURT: That's not enough. Give us a time.

Q Prior to closing, to whom did you tell that?

A I have discussed it with the National personnel.

Q Would you tell us whom, please?

A Ray -- Frank Oddi and Whitney Drake, Lou Lerner. There's Ray Horner or John Over. I get them all mixed up. Both of those guys at one time or another. And probably others.

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Q Did you tell it to anybody in your company?

A Yes.

Q Who?

A I'm sure I've told it to at least Mr. Lazar, who was my executive vice president, and I'm sure I discussed it at the board of directors meeting when I suggested that we purchase the Atomichron product line.

Q Prior to the closing did you tell any of these people of the importance of either stopping Hewlett-Packard or of getting a royalty from Hewlett-Packard?

A Absolutely.

Q The same people?

A Specifically, Mr. Lerner.

Q Anybody else?

A Yes. All the people -- this was a constant discussion basis.

Q Specifically them too?

A Specifically whom?

Q These other people.

Q At National?

Q Yes.

A Yes.

Q Oddi, Drake, Horner.

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Prior to February 3, 1969, contract and closing, did you discuss with patent counsel the validity of the Zacharias patent?

MR. GOLDMAN: May I ask whose patent counsel?

THE COURT: I assume he means any patent attorney.

A I had occasion a year before to examine it and I've gotten the indication that the patent is a strong one.

Q To examine it yourself or with patent counsel?

A I examined it myself and I also asked the opinion of patent counsel.

Q Who?

A Incidentally, it was a member of the Amster & Rothstein firm.

Q Do you remember whom?

A It was either Mort Amster or Jesse Rothstein.

Q That is a year before February, 1969 you consulted patent counsel as to the validity of the Zacharias patent?

A Not to the validity. Could we manufacture

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an atomic apparatus without that patent. That was the basic discussion.

Q Was that a legal question or a practical manufacturing problem?

A It was a practical. We were contemplating going into manufacturing the atomic standard a year before.

Q So you asked the lawyer whether itwas possible as a practical matter to manufacture the patent without using the Zacharias device?

A No, it was the patent, to the best of his knowledge, valid at the time, and was there some way of manufacturing apparatus without -- using a modification to that basic patent.

Q Did you get any opinion in writing from them?

A I don't believe so.

Q Did they give you an answer that it was practical to manufacture the device without the patent?

A No.

Q What did they say?

A They said to the best of their knowledge, the patent is valid and it would be very difficult, if not impossible, to go around it.

Q That was an oral opinion to that effect?

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A Yes.

Q That was a year before you went into the transaction?

A Yes, and we discontinued pursuing going into the product line at that time.

Q At that time were you contemplating going into the product line without any deal with National?

A That's correct.

Q And you abandoned that and then revived it when you started talking with National about acquiring the product line?

A I was abandoned when -- I was advised that National has a very strong patent position and I revived it when I wanted to buy the patent position from National.

Q And it was the Amster firm that advised you that National had a very strong patent position?

A Basically we are talking about the Zacharias patent only.

Q Let's talk about the Zacharias patent only. A year before or so before the February, 1969 transaction you had an opinion, oral, from the Amster firm that National had a very strong patent position, is that correct?

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A Yes.

Q Did you believe them?

A I was not going to pursue the product line if there was any question.

Q Did you believe them?

A If there was a question that the patent is strong, I wasn't going to pursue the product line, Mr. Schreiber.

Q You had been using the Amster firm for some five years before 1972, as I recall?

A On various occasions.

Q They were the only patent firm you were using prior to 1972?

A I believe no, there was some patent issued with the Navy, that we used the United States Navy patent attorneys; and there was one other patent attorney I had seen at one time.

Q Who was that?

A I don't recall.

Q But you had used the Amster firm in 1965, had you not, to obtain a patent for you?

A I used the Amster firm, I believe, twice in the existence of Frequency Electronics.

Q At the time in 1968 or so you consulted them

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about the Zacharias patent, they were the patent firm you were using?

A For that particular task, yes.

Q Based upon their opinion, that the Zacharias patent was valid, you abandoned any attempt to get into that line, is that correct?

A I didn't want to pursue it.

Q Now, when you started to pursue it again, after the Atlantic City meeting with Horner and Oddi and the others, did you ask the Amster firm whether it was still their opinion that the Zacharias patent was valid?

A No.

Q At any time prior to the closing in February of 1969 did you ask the Amster firm whether the Zacharias patent was valid?

A No.

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Q Did you ask any patent counsel about the validity of the patent?

A No.

Q Prior to the closing, did you ask the Amster firm whether acquisition of the Zacharias Patent would give Frequency a good claim against Hewlett-Packard for infringement?

A I testified I didn't consult Amser and Rothstein prior to the closing.

Q Whether with regard to the validity of the patent or with regard to the possibility of suit against Hewlett-Packard for infringement?

A I didn't consult them.

Q In any respect?

A In any respect.

Q And you consulted no patent counsel in any respect prior to the closing; is that correct?

A That is correct. Of course, I testified, Mr. Schreiber, that I had a discussion with Whitney Drake, his counsel. I don't know. I don't know if he is a patent counsel. And I had a brief conversation with Clarence Lyon.

Q Well, Clarence Lyon you said was -- the record will show what you said about Clarence Lyon.

You had no opinion from Clarence Lyon, did you,

as to the validity of the Zacharias Patent?

A No.

Q Prior to closing?

A No.

Q Nor as to the potential for a claim against Hewlett-Packard prior to closing?

A No.

Q Do you recall who drafted the contract of sale?

THE COURT: Would it matter? Is there some claim of ambiguity about the contract?

MR. SCHREIBER: I wanted to see if he was a patent lawyer.

A No.

Q Was that somebody from the Cashman firm, Pryor, Braun firm?

A Are you talking about the final contract or the preliminary basic outline of the contract?

Q The final contract.

A The final contract was drafted, to the best of my knowledge, by Mr. Kent Klineman, who was counselor for Frequency, or Whitney Drake. I don't recall who drafted the final version.

Q Mr. Klineman was a member of your board of directors?

A Yes.

Q And Mr. Klineman was a member of the Pryor, Braun firm?

A Yes.

Q And he was a lawyer, of course?

A Yes.

Q I believe he signed the contract at closing?

A I believe so.

Q Were you present at the closing?

A I don't think so. I'm not sure. I could have been or not.

Q You don't recall.

Do you know where the closing took place?

A I don't recall.

Q Did you see the final agreement before it was executed?

A I believe so.

MR. SCHREIBER: If I may have just a moment, your Honor.

THE COURT: All right.

(Pause.)

Q You have yourself taken out patents previously?

A I'm sorry?

Q You have taken out patents yourself?

A Yes.

Q On more than one occasion?

A Yes.

Q You are familiar with assignments of patents as well? You have seen patents assigned?

MR. GOLDMAN: I object to the form of the question, your Honor, familiar with assignment.

THE COURT: You have seen assignments?

THE WITNESS: I don't know what assignments means, your Honor, I'm sorry.

THE COURT: So the answer is no.

Q Did you see the final contract before it was signed?

A Yes.

Q Did you read the form of assignment of patents which is part of that contract?

A I read the agreements. I must have read that.

Q Did you note the language which read, under the form of assignment of patents, "National Radio Company, Inc., hereby assigns to said Frequency Electronics, Inc., all right, title and interest in and to the patents and inventions," and so on? Did you read that language?

A I read through the whole agreement, I'm sure.

Q Did you understand that language to be different

from the language of warranty applicable to the items conveyed as listed in that agreement?

MR. GOLDMAN: Objection, your Honor. I think that calls for a legal conclusion by the witness.

THE COURT: Not necessarily. He is asking him about this witness' understanding and he is going to be bound by the answer.

THE WITNESS: I am not a lawyer, Mr. Schreiber, and I leave the intricacies of the law to people I pay to do it for me.

Q Did you tell these lawyers to whom you left this responsibility that you wanted to be sure that Frequency would obtain full title to the patents and particularly to the Zacharieas Patent?

MR. GOLDMAN: Objection, your Honor, I think that is a privileged communication.

THE COURT: No, I think that objection is just as silly as the question. I will sustain the objection.

What do you expect him to say? Don't you expect him to say certainly, of course? What witness would testify differently?

Let's please conclude. He told his lawyers he didn't care whether he got anything or not, he didn't care what they put in the agreement. Let's be logical

here, gentlemen. Please continue.

Q You testified yesterday that you had three meetings with Mr. Lerner during which you discussed price, the validity of the patents, Hewlett-Packard, Zacharias Patent; is that correct?

A Are you saying did I discuss it at every one of the meetings?

Q No, at one or the other of the meetings.

A Yes.

Q Did you have any other negotiations with Mr. Lerner concerning the terms of this agreement?

MR. GOLDMAN: I don't, either. If the witness doesn't understand it, he can say I don't understand it.

THE WITNESS: I don't.

Q Other than these items, did you discuss any other items of the agreement with Mr. Lerner, such as what items were to be included in the sale?

A We discussed in -- sharing in the royalties on the Hewlett-Packard infringement.

Q You discussed that with Mr. Lerner?

A To the best of my knowledge, yes.

Q Did you discuss with Mr. Lerner the amount of royalty?

A We discussed the amount of royalty we were going

to pay National, yes.

THE COURT: He means did you discuss the amount you were going to demand from Hewlett?

THE WITNESS: Oh, I'm sorry, your Honor. I don't recall that. I recall discussing the five per cent royalty we are going to pay National.

Q Do you recall any other discussions with Mr. Lerner?

A Other than --

Q Other items having to do with the final agreement.

A I think I have testified to the highlights of my recollection.

Q Was there any negotiation between you and Mr. Lerner concerning these various matters that you discussed with him?

A We discussed the general price.

Q What was that discussion?

A The discussion on how much Frequency is willing to pay for the product line which we mentioned --

Q Did you agree with Mr. Lerner on price?

A I believe -- if discussing a price that we are willing to pay and we continued talking is an agreement, then we reached agreement. The exact detailed agreement

was reached by other people, by primarily Mr. Frank Oddi at National Company.

THE COURT: Talking with whom?

THE WITNESS: Talking with me, with Mr. Lazar and probably with Mr. Kent Klineman. I know the letter of intent was signed by Mr. Lazar in my absence.

Q Lyon Exhibit 6 reads, "The agreement, as outlined above" --

MR. CARR: Trial Exhibit 6.

Q Trial Exhibit 6 reads, at the third page, which is unnumbered, "The agreement as outlined above was arrived at by Frank F. Oddi, representing National Radio Company, Inc., and Martin B. Bloch, representing Frequency Electronics, Inc. at a meeting at the office of Frequency Electronics, Inc., on November 25, 1968, and subsequent conversations by telephone between the same two individuals during the period 29 November and 30 December 1968. '

Does that jibe with your recollection as to who negotiated the deal?

MR. GOLDMAN: Your Honor, may I say that if Mr. Schreiber is going to use the document he refers to for any purpose other than impeachment, I would object to it on the grounds that it has been merged in and superseded by the final agreement, Exhibit 1, and that it is

violative of the procedural evidence rule.

THE COURT: I don't know that it necessarily is. I will reserve decision on that point. However, at this moment, as I understand it, it is offered for purposes of impeachment.

You see, I suppose we are on the Massachusetts procedural evidence rule, aren't we? Because the agreement specifically incorporates, Exhibit 1 incorporates, Massachusetts law. I think under the New York rule the exhibit would come in because it explains, gives the background of leading up to the agreement, it explains whatever ambiguity may exist in the agreement, as to whether they warranted this patent.

MR. SCHREIBER: I offer it only for impeachment, your Honor. I would concede --

THE COURT: It is all really merged in Exhibit 1.

MR. SCHREIBER: I would concede it is all integrated in Exhibit 1, that Exhibit 1 specifically says that all prior negotiations and understandings between the parties are abandoned and merged into Exhibit 1. It so specifically reads.

THE COURT: Do you all agree that Massachusetts would give effect to such an integration clause.

MR. GOLDMAN: Your Honor, I can't make that

stipulation at this time. I have to check the point.

THE COURT: Without prejudice then.

MR. SCHREIBER: We would so stipulate, your Honor.

THE COURT: All right. Proceed. The question is, does such a statement accord with your recollection.

THE WITNESS: I forgot -- could you specifically ask the question so I can answer?

Q I believe I can, Mr. Bloch.

Is it your recollection that you and Oddi negotiated the deal?

A Me and Oddi concluded some of the highlights of the deal.

Q Is it your recollection that only you and Oddi negotiated all of the terms of the deal?

A If you think that the letter of intent outlines the deal completely. I didn't even sign the letter of intent so obviously, Mr. Schreiber, there must have been other people present.

MR. GOLDMAN: Your Honor, I think from the witness' answer he didn't understand that question and I'm not sure I understand it.

THE COURT: I will allow his answer to stand. I think he has answered the question.

MR. GOLDMAN: I move to strike it.

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THE COURT: Motion denied. Let's move along, please.

Q Mr. Bloch, after the closing in February of 1969, when you found that you didn't have this Hewlett-Packard letter that was never found, having to do with the preclosing claim on Hewlett-Packard, did you make any claim on National Company based upon the absence of any such letter?

MR. GOLDMAN: Objection, your Honor. I think that may call for a conclusion of law.

THE COURT: As to whether he made a claim?

MR. GOLDMAN: Well, as to what a claim is.

THE COURT: Overruled.

A I didn't, to the best of my knowledge.

Q Did you protest to anybody?

A I testified, Mr. Schreiber, that we at that time didn't go through all the voluminous files transferred to us at that time.

Q Even for so important a letter, no specific search was made?

A Well, the failing of scientists is when they get engrossed in a product with sometimes loose perspective. And we hired Mr. Lyon -- we discussed with Mr. Lyon and he got permission from National to represent us, so I felt it is totally material since he is going to proceed with

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the action.

Q When you hired Mr. Lyon, did you ask him whether there had been any prior demand made on Hewlett-Packard?

A I don't recall, Mr. Schreiber.

Q Did he ever tell you that there had been any prior demand made on Hewlett-Packard as to his knowledge?

A I don't recall.

Q Was there a deal renegotiated with National whereby the purchase price was reduced by $23,000 sometime in June of 1969?

A I believe so.

Q Do you recall what items accounted for that price reduction?

MR. GOLDMAN: Your Honor, there is a letter agreement covering this subject matter.

THE COURT: If there is a letter agreement, why don't you offer the agreement?

MR. SCHREIBER: May we have it?

MR GOLDMAN: Let me just get the exhibit number.

THE COURT: It has nothing to do with the Zacharias Patent, does it?

MR SCHREIBER: That's precisely my point, your Honor.

THE COURT: They had a letter agreement of some

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deficiencies that they settled for $23,000.

MR. SCHREIBER: That is correct.

MR. GOLDMAN: We will so stipulate.

MR. SCHREIBERG: And if it didn't include the Zacharias letter we need not burden the record.

MR. GOLDMAN: It is June 1969, I'm looking for the exhibit number, your Honor, and we will introduce it.

THE COURT: You may introduce it later, if you wish.

MR. SCHREIBER: Thank you. May I have just a moment to consult with counsel?

THE COURT: All right.

(Pause.)

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MR. SCHREIBER: I would like to offer, your Honor, Exhibits G-1 through 5 which are minutes of the meetings of the board of directors of Frequency for January 21, 1969, April 29, '69, July 31, '69, March 19th of '70, and May 13th of 1971.

THE COURT: What are they offered to show?

MR. GOLDMAN: Your Honor, I have no objection to those minutes.

MR. SCHREIBER: The board's approval and basis for approval of the transaction, the board's approval of the discontinuance of the production.

THE COURT: All right.

Do these have numbers under the pretrial order?

MR. GOLDMAN: They do.

MR. CARR: They should be G, your Honor, and should have been --

THE COURT: They will be numbered the same numbers as shown in the pretrial order and received in evidence.

MR. GOLDMAN: Your Honor, I found that other agreement that we were talking about.

THE COURT: What is the number?

MR. GOLDMAN: It is Exhibit 70.

THE COURT: You see, it is so far in time prior to May 1971 but I will take it for whatever value it has.

MR. SCHREIBER: I would like it in, your Honor.

THE COURT: What is the number?

MR. GOLDMAN: '70.

THE COURT: Do you want it renumbered as a defendants' exhibit?

MR. GOLDMAN: Yes.

THE COURT: All right.

MR. GOLDMAN: Yes. Let it be renumbered.

MR. SCHREIBER: Will you give this the next consecutive defendants' number?

THE COURT: Exhibit 70 for identification is received as Defendants' Exhibit N.

(Defendants' Exhibit N received in evidence.)

xx

(Defendants' Exhibits G through K received in evidence.)

xx

Q Mr. Bloch, you testified as to three meetings with Mr. Lerner. Do you recall the approximate date of the third meeting?

A Sometime late November or early December.

Q Do you recall whether it was before or after the execution of the preliminary draft of the letter of intent?

A I don't recall.

Q You say it was late November or early December of '68?

A Yes.

Q Do you recall whether it was before or after the November 25, 1968 meeting which you had with Mr. Oddi at your office at Frequency?

A I don't recall. I don't recall whether we met with Mr. Oddi at Frequency, if it was November 25th.

Q I'm sorry?

A I don't recall the date I met with Mr. Oddi or when the meeting was held.

Q Trial Exhibit 6 indicates that the agreement as outlined in this preliminary letter of intent was arrived at at a meeting on November 25, 1968 between you and Mr. Oddi which would date that meeting, and assuming that that meeting was held on the date so indicated, November 25, '68, can you tell me whether you met with Mr. Lerner before or after you met with Oddi?

A I don't recall.

Q You don't recall?

A I don't recall.

MR. SCHREIBER: We have no further questions of Mr. Bloch, your Honor.

THE COURT: Any redirect?

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MR. GOLDMAN: Your Honor, may I have five minutes to organize my redirect?

THE COURT: We will have a ten minute recess.

(Recess.)

THE COURT: All right, you may have your redirect examination.

REDIRECT EXAMINATION

BY MR. GOLDMAN:

Q Mr. Bloch, you testified that Frequency made no sales of the Atomichron device in 1969, is that correct?

A That is correct.

Q And what was the basis for your statement that there were no sales made at that time?

A Sales is delivery and acceptance of equipment in our language, and we got the contract in 1969 but since we had to totally redesign the equipment at Frequency Electronics it took almost a year and a half before we commenced deliveries.

Q So that you had contracts in 1969 but you didn't deliver any merchandise until 1970?

A That is correct.

MR. GOLDMAN: I have no further questions, your Honor.

THE COURT: Nothing else of this witness.

(Witness excused.)

MR. GOLDMAN: Your Honor, I have a five minute witness who will be my next witness if the Court wishes to hear him now.

THE COURT: Put him on.

MR. SCHREIBER: May I take a moment to offer two documents in evidence?

MR.GOLDMAN: I can at the same time offer several documents that are not contested into evidence.

THE COURT: You may do that.

MR. SCHREIBER: We offer Exhibit 9, the assignment of patents, actually executed and Exhibit 10, the bill of sale actually executed covering the hardware delivered.

THE COURT: You are offering these plaintiff's exhibits?

MR. SCHREIBER: That's right.

THE COURT: Do you want them remarked?

MR. SCHREIBER: I don't care if they are remarked or not.

THE COURT: Then they will be received with their existing numbers. They are already marked 9 and 10.

9 and 10 are received.

(Plaintiff's Exhibits 9 and 10 received in evidence.)

xx

MR. GOLDMAN: Your Honor, we will offer at this time, Plaintiff's Exhibit 2 which is a $200,000 promissory note, Plaintiff's Exhibit 3, which is a $325,000 promissory note, Plaintiff's Exhibit 13, which is an assignment from National Radio Company to Mr. Lerner relating to the $325,000 note, Plaintiff's Exhibit 14, which is an assignment to Mr. Lerner relating to the $200,000 note, Plaintiff's Exhibit 24, which is a letter to Frequency Electronics from the Middlesex Bank dated January 20, 1971 --

THE COURT: All of this is enumerated in the pretrial order, isn't it? Just offer them all.

MR. GOLDMAN: All right, your Honor.

Does your Honor wish to hear argument on any exhibits we wish to offer, that have been objected to, at this time?

THE COURT: I would just as soon go forward with the witness but at any convenient time I will hear the objections to them.

I am assuming there is no objection unless someone raises an objection.

MR. GOLDMAN: That is correct. The documents offered so far are agreed to by the parties.

MR. CARR: May I say something at this juncture,

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your Honor?

THE COURT: Yes.

MR. CARR: We would want the original promissory note in rather than a copy.

THE COURT: Why?

MR. CARR: I will tell you why, your Honor. There may be an issue raised in this instance as to the assignment and whether or not under the code the assignment is affixed to part of the promissory note. There is a definite issue on that.

THE COURT: Well, we will come to that in due course.

MR. CARR: All right, your Honor.

THE COURT: We will come to that in due course.

MR. CARR: So that I would --

THE COURT: If he wants the original, he can have the original.

MR. GOLDMAN: Your Honor, I would like to raise some questions about the form of that original because Mr. Carr made some statements during the course of our depositions as to things that happened to that note so --

THE COURT: Later on, if you don't mind. Let's proceed with the live witnesses here. If anyone needs to use the note in questioning the witness, then I will

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deal with its admissibility at that time.

MR. CARR: I have no quarrel with the use of the document but somewhere in the proceedings I would like to get to the Court the original instrument which is the basis of the counterclaim.

THE COURT: We will come to it in due time.

MR. GOLDMAN: Your Honor, I have three more uncontested exhibits. 70, 71 and 72, 73 -- four more, and 81.

THE COURT: They will all be received in evidence.

THE CLERK: 70 is already in.

MR. GOLDMAN: Yes, that is correct.

(Plaintiff's Exhibits 71, 72, 73 and 81 received in evidence.)

xx

A B R A H A M L A Z A R, called as a witness by plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GOLDMAN:

Q Mr. Lazar, are you associated with the plaintiff Frequency Electronics?

A Yes.

Q What is your present position with the company?

A Executive vice president.

Q Are you a member of the board of directors?

A I am.

Q Now, going back to the period commencing in the summer of 1968, were you also associated with the company?

A Yes, I was.

Q And did you hold office?

A Yes.

Q What office was that?

A Vice president of marketing.

Q You were also a member of the board at that time?

A Yes.

Q Now, Mr. Lazar, going back to the period of about November, 1968, did you attend a meeting with any representatives of National Radio Company?

A Yes. In November of 1968 we went to the National Radio Company, Mr. Block and myself, and we met with Mr. Oddi and Mr. Horner.

Q And that was in Massachusetts at National's offices?

A That's correct.

Q And what was the purpose of that meeting?

A We had planned on the possible procurement of the Atomichron product line from the National Radio Company, and Mr. Bloch had arranged for a meeting at the National Radio Company, and I was asked to attend with him to pursue the possibility of this potential procurement.

Q You mean the purchase from National?

A The purchase of the Atomichron, yes.

Q Now, during the course of that meeting were you given any documentary material by any representatives of National Radio Company?

A The purpose of the meeting was to --

THE COURT: No. Just answer the question. Were you given any documents?

THE WITNESS: Yes, I was.

Q Can you describe any of the documents which you were given?

A I was shown a letter which had been addressed to the Hewlett-Packard Company which had to do with the possibility of an infringement of a patent which read to the effect "to cease and desist the sale of the atomic standards by Hewlett-Packard."

THE COURT: Let me understand this. Do you contend there was such a letter?

MR. GOLDMAN: Your Honor, we contend that there was such a letter shown. Whether it was ever sent is something we have no knowledge of.

THE COURT: What is your contention on this, Mr. Schreiber?

MR. SCHREIBER: No such letter ever existed.

THE COURT: All right.

Q Mr. Lazar, you say you were shown the letter?

A Yes, I was.

Q Are you certain that you were shown rather than told about a letter?

A I saw the letter before me.

Q And can you describe it generally in terms

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of whether there was any identifying letterhead or signature or name?

A There was a one-page document, and, as I recall, it was from the National Radio Company to Hewlett-Packard, and I recall very specifically the final paragraph of that letter in which it had the language "cease and desist the sale of the atomic standards" that were being manufactured by the Hewlett-Packard Company.

Q Do you recall whether you saw what appeared or purported to be a signature on the letter?

A I believe it was a signed letter.

Q And do you recall the name that was signed on the letter?

A I cannot recall the name.

Q Now, did you, at that meeting or at any subsequent time, discuss with the National people whether the letter had been sent to Hewlett-Packard?

A I was advised that the letter had been sent.

Q Do you recall who advised you of that?

A I believe it was Mr. Horner.

Q And did you ask if there was any response to the letter?

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A I was advised that the letter had been sent but they weren't in a position to tell me what the repsonse was and they weren't represented at that meeting by their counsel, and they could not be certain of what the activity had been since the sending of the letter.

Q You say they weren't represented by their counsel. Did they say their patent counsel or counsel in general?

A I really can't be more specific than that.

Q Did you discuss that letter at any time with Mr. Bloch?

A Yes.

Q And did Mr. Bloch express to you any opinions about that letter and the importance or nonimportance of that letter?

MR. SCHREIBER: Objection, your Honor.

THE COURT: Sustained unless there is a showing that it is binding on this defendant.

MR. GOLDMAN: Your Honor, Mr. Bloch is here in court. I think this is just corroborative of his testimony as to relying on the letter.

THE COURT: You can ask Mr. Bloch, but I think you already have. It is hearsay from this witness though.

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MR. GOLDMAN: Your Honor, may I make an offer of proof on it?

THE COURT: Yes. I assume your offer includes a conversation between Mr. Bloch and this witness in which nobody from National or Lerner was present.

MR. GOLDMAN: That's correct, your Honor.

THE COURT: All right.

MR. GOLDMAN: And the offer would also include the belief that the witness would respond by saying that Mr. Bloch had told him that the letter had ceased to be a matter of great concern because he had spoken to senior management representatives of National and had been given the memorandum which we previously spoke of, which is, I believe, Plaintiff's Exhibit 46.

THE COURT: I think that that sort of order you ought to elicit by question and answer. I thought he was going to have a little different conversation.

Go ahead and listen to your offer of proof by question and answer.

BY MR. GOLDMAN:

Q Mr. Lazar, did you discuss the letter which

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you have described with Mr. Bloch?

A Yes, I did.

THE COURT: When and where and who was present?

THE WITNESS: I discussed this with Mr. Bloch at the meeting at National Radio Company at that particular time and place.

THE COURT: Who was present?

THE WITNESS: Mr. Horner, Mr. Oddi, Mr. Bloch and myself.

THE COURT: I will take it.

Q What was said on that occasion about the letter between you and Mr. Bloch?

A I just told Mr. Bloch I was very pleased to see that this letter had been written and I felt better about our particular position at that time.

Q And after the meeting at National Radio Company did you discuss the letter at any subsequent time with Mr. Bloch?

MR. SCHREIBER: I will object unless the answer is just a yes or no, your Honor.

THE COURT: I will permit him to answer it asnd I will take the offer of proof in question-and-answer form, assuming he establishes nobody from National

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or from Mr. Lerner was present.

A I had discussed the --

THE COURT: Can you answer yes or no?

A Yes.

THE COURT: All right. State when and where and who was present.

THE WITNESS: I really can't account to the specific occasion but it was discussed with Mr. Bloch on several occasions after the meeting.

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BY MR. GOLDMAN:

Q Was it ever discussed with Mr. Bloch with reference to the question of Exhibit 46, the memorandum which has been introduced into evidence?

MR. SCHREIBER: Objection.

THE COURT: On the ground of leading?

MR. SCHREIBER: Yes.

THE COURT: Sustained.

Q Was it ever discussed, Mr. Lazar, in the context of --

THE COURT: What was said? First you have to establish who was present.

Who was there when this discussion took place?

THE WITNESS: May I have the question again, please?

THE COURT: Phrase another questions.

Q You said you discussed this letter on several subsequent occasions with Mr. Bloch. Did you discuss it at any time in the presence of anyone else besides Mr. Bloch?

A There may have been perhaps other people present from our own company.

Q Was there anyone else present from National?

A Subsequent to the meeting of November?

Q Yes.

A No.

Q What did you say to Mr. Bloch about it and what did he say to you?

MR. SCHREIBER: Objection, your Honor.

THE COURT: I will take an offer of proof by question and answer.

You may have a motion to strike it out after he's answered.

MR. SCHREIBER: Thank you, your Honor.

Q What did you say to Mr. Bloch and what did he say to you?

A Specifically with reference to our discussion with regard to the letter?

Q Yes.

A The only conversation we had at that time with regard to the letter was that I felt much better about our patent position, having seen the letter.

Q Well, I think you testified that that conversation took place at National Radio Company, is that not correct?

A My original discussion with regard to the letter was with Mr. Bloch at the National Radio Company,

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yes.

Q In subsequent discussions with Mr. Bloch about the letter, when National people were not present, what else was discussed about the letter, about its effect on the patent position of National Radio Company.

MR. SCHREIBER: Objection as leading.

THE COURT: Well, it is leading. Let's get along with it. It's just a reoffer of proof.

What did he say and what did you say?

A The letter itself was not referred to with any specific patent position. You know, subsequent to the meeting at National Radio Company. Only that the letter did exist and I saw it.

MR. GOLDMAN: I have no further questions.

THE COURT: Any cross examination of this witness?

MR. SCHREIBER: I would like to move to strike.

THE COURT: Well, he didn't answer affirmatively so there is nothing to strike.

MR. SCHREIBER: Yes, sir.

THE COURT: Motion denied.

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CROSS EXAMINATION

BY MR. SCHREIBER:

Q Mr. Lazar, what is your professional training?

A I am an engineer, Bachelor of Science, mechanical engineering, New York University, 1953.

Q Have you any patents taken out in your name?

A In my name exclusively, no.

Q Or as co-inventor?

A With Bulova Watch Company.

THE COURT: What did you invent?

THE WITNESS: It was a timing mechanism that was associated with artillery fuses.

Q Mr. Lazar, you said that you were shown this letter from National to Hewlett-Packard. By whom?

A By Mr. Horner.

Q Did he hand you a copy?

A He had a copy in his hand and he placed it before me, which I was able to read.

Q Did he hold it in his hand or did he give it to you?

A He gave it to me in my hand and at that time I gave it back to him when I finished reading the letter.

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Q Was this an original copy, a ribbon, or was it a carbon copy?

A I really can't recall.

MR. GOLDMAN: Objection. It assumes it was no other kind of copy but an original or a copy.

THE COURT: Cross examination, overruled.

Q Sir?

A I can't recall. I assumed it to be a copy of a letter which had been sent previously.

Q You say you assumed that. Did anybody tell you that?

A Yes.

Q Who told you that, that it had been sent previously.

A It was said by Mr. Horner.

Q Was that a statement by Mr. Horner or an assumption on your part?

A It was a statement that this letter had been sent to Hewlett-Packard.

Q I read to you from your prior testimony, February 24, 1975, page 38, line 19:

"Q What is your recollection that anyone told you about whether or not that letter had

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been mailed to Hewlett-Packard?

"A We didn't really pursue any investigation along those lines. Having seen a letter which was dated much earlier than our particular meeting, we just assumed that this letter had been mailed and delivered. We had no reason to think otherwise."

Does that refresh your recollection as to whether it was an assumption on your part or a statement by Mr. Horner?

A I think my deposition is more accurate.

Q It was an assumption on your part,not Mr. Horner's statement?

A Yes.

Q What was the date on that letter?

A I can't recall.

Q How much earlier than November of 1968, the date of your meeting, was it dated?

A I would just be guessing.

Q You say there was a signature on that letter?

A It appeared to me to be a signed letter, yes.

Q Well, you have seen signed letters, you

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have experienced it before?

A Yes. I think there was a signature on the letter.

Q You don't know whether it was the original or a copy that you saw?

A I can't be sure.

Q So you can't be sure whether, if it was mailed, as you assume, they had mailed a copy or an original, that is, mailing a copy and keeping the original.

A When I examined the letter, frankly, I had no reason to be so investigative as to what the origin was or whether it had been mailed or not mailed. I just saw the letter.

Q Mr. Lazar, this was an important letter of importance to you, was it not?

A Not at that time.

Q No? Did you not say to Mr. Bloch at that time that you were pleased that such a letter had been sent?

A Yes.

Q So that it had importance to you at that time, had it not?

A Relative importance, yes.

Q Important because it was a cease and desist of

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a patent infringement concerning a patent that you were about to acquire?

A Yes.

Q The basic patent that you were about to inquire?

A Yes.

Q The patent without which you would not make the deal, is that not correct?

A That's a good probability.

Q So this was an important letter, was it not?

A Relative importance.

Q And you didn't ask anybody whether in fact it had been sent rather than just typed out, and left with a signature on it so that some time later -- you didn't say how much later -- but some time later you could look at it and assume it had been sent?

A I had no reason to think otherwise.

Q And you made no inquiries as to whether in fact it had been sent?

A I had no motivation to make an inquiry.

Q Did you ask whether any reply had been received?

A I had asked if that was a response to that letter, and they were not in a position to give me an

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answer.

Q Who did you ask that of?

A I believe it was put to Mr. Horner.

Q That's your best recollection today?

A Yes.

Q What did he say about why he couldn't tell you whether there was an answer?

A He had no information to give me on that subject at that time.

Q Was it Mr. Horner's signature that you saw at the bottom of that letter?

A I can't recall.

Q Did you ask him whether he had signed the letter?

A No, I didn't.

Q Did you ask him whether he had sent the letter?

A No, I did not.

Q But he had no information that he could give you. Did he tell you why he had no information about a response?

A He didn't have the information to give me at that time.

Q Did he say who had the information?

A He didn't suggest.

Q Did you ask him who would have gotten the reply if there had been one?

A No, I didn't pursue it along those lines.

Q Why?

A Well, we were going to have at that particular occasion a meeting which was a good faith between the company that wanted to buy and one company that wanted to sell and I saw no reason at that time to be overly suspicious or to make either that sort of inquiry or to think otherwise.

Q Was it not of importance to you at that time, Mr. Lazar, to know whether Hewlett-Packard had written back and said, "We give up, we will stop manufacturing"?

A Yes, I suppose that would have been of some significance to us.

Q Or that Hewlett-Packard had written back and said, "The devil with you, we are going ahead because the patent is no good," that would have been of importance too, wouldn't it?

A Yes, it would have.

Q But you didn't ask whether there was any reply from Hewlett- Packard?

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A Yes, I did.

Q But you didn't press to see who had the reply or where it might be located?

A The information I got back was that they didn't have the information in response to that letter.

Q Did they tell you why they didn't have the information in response to that letter?

A They didn't.

Q That information in response to the letter presumably you assumed would be a letter in response?

A One would think so or perhaps even no response.

Q Did you ask whether there was no response?

A I wasn't performing an investigation.

Q No, but you were performing a preliminary meeting, were you not, leading up to the purchase of some almost $1 million of product line?

A Had this letter not been put before me, I would have never known the letter existed.

Q But having had the letter before you, didn't you want to press and find out right then and there what response, if any, had been received?

A In my considered opinion that was not the time and place to pursue such a subject.

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Q Very good. When was the time and place and when did you pursue that subject?

A That's a presumption on my part, your Honor, I think.

THE COURT: All right. If you don't know --

Q Did you ever pursue that subject?

A Myself personally?

Q Only you.

A No.

Q You never did.

Do you know whether anybody else ever did in your hearing?

A No.

Q You were vice president, sir, in charge of marketing?

A That's correct.

Q As vice president in charge of marketing, was it your belief that it would be important to stop Hewlett-Packard from competing with you in your marketing activities if you acquired the product line?

A Yes, indeed.

Q Vital, otherwise you wouldn't want to acquire the product line, is that not correct, sir?

A That's a possibility.

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Q That is, your are not sure whether you would have acquired the whole product line even if Hewlett-Packard had continued to compete?

A That is a possibility.

Q You might have.

Did you ever discuss that with Mr. Bloch, that is, whether it was essential to have Hewlett-Packard out of the way or else you wouldn't go into the deal?

A To that extent, no.

Q To any extent. To what extent did you discuss it with Mr. Bloch?

A Only to the extent as to what the actual buying price might be.

Q But not to the extent of whether or not you would buy if Hewlett-Packard was not eliminated?

A I think that discussion comes under one umbrella.

Q Tell me what you said on the score of buying or not buying depending on whether or not Hewlett-Packard was eliminated.

A These things were not discussed on a singular basis. It was handled on one total evaluation. We didn't specifically try to single out what the value might be with or without or and and the but. It was not

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on that basis.

Q And you didn't discuss on any basis as to whether or not you would go into the deal if you couldn't eliminate Hewlett-Packard?

A We didn't discuss it on that basis, on a singular basis.

Q Now, Mr. Lazars, between that November 1968 meeting and the closing on February 3, 1969, what, if anything, did you do to pursue the inquiry as to whether or not a reply had been received from Hewlett-Packard to that letter that you say you saw original signature or signatures on it that day in November at National?

A I did nothing.

Q Nothing.

Did you attend the closing?

A No.

Q After the closing, did you do anything to find that letter?

A No.

Q After the closing you recall a volume of folders containing documents being delivered by National to Frequency?

A Just vaguely I can recall that we had moved in some large volumes of files.

Q Files that looked like this, and I'm indicating an outer legal folder.

A I can't recall.

Q What did they look like, these large volumes?

A I can't recall.

Q Did you ever go into any of them to look at them to see what was in them?

A Myself personally, no.

Q Do you know whether those folders contained any customers lists of National for its Atomichron?

A Yes.

Q They did?

A Yes.

Q How did you know that?

A Because I saw some of these lists when I was out at National.

Q After delivery to you of this volume of folders, do you know whether any of those volumes contained customers lists of National?

A They may have. I can't be that sure.

Q Did you ever go to look for them?

A Myself, no.

Q Who did?

A I can't be sure.

Q As vice-president of the marketing, Mr. Lazar, was it not of importance to you to find customers lists who had previously bought Atomichrons from National so that you would know potential customers for Atomichrons to be sold by Frequency?

MR. GOLDMAN: Your Honor, I'm going to make an objection. I think this is getting beyond the scope of the direct examination.

THE COURT: I will overrule the objection. But I think the question is somewhat argumentative. You see, this witness has not saidhe didn't get the customer lists. He said he doesn't know whether it was in these envelopes that you described. He can answer it.

Was it important to get the customers lists?

THE WITNESS: No.

Q Do you know whether anybody went into those envelopes to look for a copy or the original of that letter that you saw addressed to Hewlett-Packard?

A I don't know.

Q You didn't?

A No.

Q At any time after the closing?

A There was an attempt, a short while ago, to look for that letter within the National files, but

unfortunately, as I understand it, they were in receivership and we were -- we either found it very difficult to obtain or it was not available.

Q You say a short time ago, Mr. Lazar. When was that?

A About seven or eight months ago.

THE COURT: You mean files that belonged to National, not files that belonged to your company?

THE WITNESS: Files that belonged to National.

THE COURT: He is asking about the files of National which were turned over to the plaintiff in this case at or about the time of the closing.

THE WITNESS: I don't know of any search that was made.

Q And the search that you refer to seven or eight months ago, that was attempted to be made on the files of National, was for purposes of this litigation?

A Yes.

Q Who made that search or attempted to make it?

A It was suggested to an attorney.

Q Was it done?

A I don't know.

Q So you don't know of any search since closing that was actually made to find that supposed letter to

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Hewlett-Packard?

A I am not knowledgeable of any search.

Q At this time when you saw this letter, Mr. Hroner handed it to you physically, and you held it and then you gave it back to Mr. Horner, having read it, did Mr. Bloch see it?

A I thought he did.

Q He was in the room?

A Yes.

Q How big was this room that he was in? Was it at National Company in Melrose?

A Yes.

Q The president's office?

A It was in the conference room.

Q The conference room. How large is that room?

A I would have put it at approximately 18 by 20 feet; something like that.

Q That's the long conference room that led off the president's office, adjacent to the president's office?

THE COURT: Let's move along. They had a meeting in the room. The room was big enough to have a meeting and he thinks that Mr. Bloch saw the letter. The Court understands all of that.

Q Did Mr. Bloch read the letter?

A I can't be sure. I assumed he saw the letter.

Q Did you hand it to him?

A I didn't mishand it to him.

Q Did you see him holding it?

A No.

Q Did you see anybody hand it to him?

A No.

THE COURT: I would like to know the purpose of belaboring this. I have right in front of me Exhibit 1, paragraph 8, and I read that. I think that suggests to the Court that there was an outstanding claim for patent infringement. Isn't it?

MR. SCHREIBER: The prime reason I go after this is really veracity of the witness.

THE COURT: Well, all right. I don't know how simple this letter is. Please go ahead. That paragraph 8 didn't get into that agreement by accident, I trust.

MR. SCHREIBER: I would like to offer in evidence, your Honor, Trial Exhibit 6, which is a letter agreement executed as of December 30, 1968.

MR. GOLDMAN: Your Honor, I had thought that that was previously offered and that I had made my objection on the grounds of the procedural evidence rule.

MR. SCHREIBER: I'm offering it in order to

date the November 25, 1968, meeting between Mr. Oddi and Mr. Bloch.

MR. GOLDMAN: Your Honor, I'm going to object to any testimony that may go into the terms of that agreement or when that meeting was held.

THE COURT: Hadn't he given us the meeting already?

MR. GOLDMAN: No, your Honor. This, I believe, is another meeting and that's a meeting -- well, perhaps the testimony is needed to establish it. Simply stated I think it is beyond the scope of the direct.

THE COURT: Well --

MR. SCHREIBER: I'm trying to date the meeting which Mr. Lazar testified to on direct as having taken place at National, which he attended with Mr. Bloch.

MR. GOLDMAN: I wouldn't object to questions along that line, your Honor.

THE COURT: All right. It may be shown to him to refresh his recollection to fix the date. I may have to deal in greater depth with this procedural evidence rule before we go too much farther.

You see, I don't really take the contentions as they are set forth in the pretrial order to assert a claim of fraud. Perhaps I'm mistaken.

MR. GOLDMAN: You don't take them to assert a claim of fraud, your Honor?

THE COURT: Are you claiming a common law fraud?

MR. GOLDMAN: We are claiming misrepresentation, your Honor. Whether there be scienter or not, we are claiming misrepresentation and I think that --

THE COURT: You see, the representations and the warranties may very well be merged in the agreement and they may be subject to the procedural evidence rule. If you talk about a common law fraud, at least in New York there is no merger.

MR. GOLDMAN: May I point out to the Court that there is a nonmerger agreement in Exhibit 1. There is a nonmerger clause in Exhibit 1 saying that all warranties survice the closing.

THE COURT: That is true, but it also states, if I recollect correctly, and I'm looking for the page now, that all discussions and matters prior to -- paragraph 15, page 7 of Exhibit 1 -- supersedes all prior understandings of the parties.

MR. SCHREIBER: And it is captioned procedural evidence.

THE COURT: But you see that won't foreclose the claim of fraud.

MR. GOLDMAN: Your Honor,may I suggest that prior understandings of the parties don't reach representations that are made to induce a party to enter into and agreement. That clause --

THE COURT: Ordinarily the representations made in the absence of fraud would be deemed in the agreement. But again we are talking Massachusetts law. I don't know how helpful it is for us here.

MR. GOLDMAN: It is our position, your Honor, and I think that whether the misrepresentations have been frought based on common law fraud or whether they have been simple misrepresentations, that there is a basis for an independent theory along those lines, we are not waiving any claim of common law fraud such as the proof may reveal.

THE COURT: Well, ordinarily, you see, the seller's talk is merged in an agreement and the agreement is supposed to tell you what you are getting, in the absence of fraud.

MR. GOLDMAN: I submit, your Honor, that if the seller says to the buyer "This patent is important, we have no reason to doubt that it is a valuable patent, it will permit you to have an important market in the product," and then the parties go ahead and sign an agreement which contains various warranties and so forth --

THE COURT: And a statement that no other warranties are made in connection with your --

MR. GOLDMAN: Your Honor, that statement, no other warranties are made, refer to warranties under the agreement itself. I don't believe it has anything to do with representations inducing actions, inducing reliance, and inducing the partie to execute the agreement itself.

THE COURT: But it is integrated. It is an integrated agreement.

MR. GOLDMAN: I would respectfully suggest that the integration can't reach representations which at the time the agreement was made were not known to be false.

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THE COURT: Weren't known to be false by whom?

MR. GOLDMAN: By the buyer.

THE COURT: All right. Only?

MR. GOLDMAN: Correct.

THE COURT: That would be fraud, wouldn't it?

MR. SCHREIBER: That would be common law fraud, and if there were common law fraud, I would think my friend would be right, but he has the burden under Massachusetts law of proving precisely what the misrepresentations were so as to prove common law fraud.

THE COURT: Of course there is an additional difficulty that you have this paragraph 8 here which implies to me, at least, that both parties knew that somebody was infringing this patent. I assume it is this patent. We haven't any evidence to tie clause 8 down to the Zacharias patent.

MR. GOLDMAN: I think we do, your Honor. I think Mr. Bloch testified that that clause relating to an assignment of the patent cause of action for infringement and a division of royalties in favor of National, that that clause was discussed or the predicate for that clause was based on discussions with Mr. Lerner.

THE COURT: Well, I will permit you to make a complete trial record here and if you want to introduce No. 6 as a defendants' exhibit I will permit you to do so subject to a motion to strike.

MR. SCHREIBER: Thank you, your Honor.

THE COURT: At the close of the case, as to which I will reserve decision.

MR. SCHREIBER: I would just point out that as to clause 8 in trial Exhibit 1 it does not require Frequency to bring suit for patent infringement but says that if FEI does, it will assume all risk and all expenses of such litigation.

THE COURT: It implies to me that the parties recognize that there was most likely a presently existing cause of action for infringement.

MR. SCHREIBER: Was or could be.

MR. GOLDMAN: I think that's the purpose of the agreement to us, whether we chose to go ahead and sue on it, all National cared was that they got royalties if we did something.

THE COURT: All right, you may offer No. 6 and I will take it subject to a reserved motion to strike by the plaintiffs.

MR. SCHREIBER: Thank you, your Honor.

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MR. GOLDMAN: If such a motion is made, may we submit briefs on it, your Honor, at the close of the case.

THE COURT: Certainly. Do you want it remarked as a defendant's exhibit?

MR. SCHREIBER: That would be satisfactory, sir.

THE COURT: How much more is there from Mr. Lazar?

(Plaintiff's Exhibit 6 received in evidence and marked Defendants' Exhibit O.)

xx Q I would call your attention to the second page of the exhibit that you hold before you, Defendants' Exhibit O, the first paragraph beneath the captioned closing which refers to a meeting on November 25, 1968, does that refresh your recollection in any way as to the date when you went to National with Mr. Block.

A It was before November 25th.

Q It was before November 25th?

A Yes.

Q Do you recall how much before November 25th?

A I can't recall. It was during the early part of November.

Q Prior to that time had Mr. Bloch told you

of any meetings he had with Mr. Lerner?

A I don't recall.

Q Did Mr. Bloch show you any paper or papers he had received from Mr. Lerner?

MR. GOLDMAN: Your Honor, I think this is beyond the scope of the direct examination.

THE COURT: I am taking it only on credibility. He's going to be bound by the answers.

MR. GOLDMAN: Note my objection, please.

THE COURT: It's a preshake of the question. This witness is likely to hit the examiner right between the eyes with an answer. Every time Mr. Schreiber asks these open-ended questions you object. I think you are having an identity crisis.

Go ahead and shake it up. We have to finish this trial.

Q Did Mr. Bloch ever show you any paper or papers that he had received from Mr. Lerner?

A No, he had not.

Q And this includes any time right up to your meeting at National?

A That's correct.

Q And at any time up to closing?

A That's correct.

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MR. GOLDMAN: May I have one question.

THE COURT: I don't know if he is finished yet.

MR. GOLDMAN: Oh, I am sorry. I thought you had finished.

MR. SCHREIBER: No.

Q Mr. Lazar, in your conversations with Mr. Bloch prior to closing did you have any discussion of the Zacharias patent?

MR. GOLDMAN: Note my objection again, your Honor.

THE COURT: Sustained.

You won't learn, will you.

MR. SCHREIBER: I withdraw the question.

THE COURT: The objection is sustained.

MR. SCHREIBER: No further questions.

THE COURT: All right. Go ahead, Mr. Goldman.

REDIRECT EXAMINATION

BY MR. GOLDMAN:

Q Mr. Schreiber asked you if you ever received any papers from Mr. Block ot ever discussed with Mr. Bloch any papers which were received from Mr. Lerner, is · that correct, and you testified you didn't and he

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didn't?

A That's right.

Q Did he ever discuss with you any information which he had received from Mr. Lerner or National's representatives concerning the status of the patents?

A Yes.

Q Other than as respects this letter which you previously testified to?

A Yes.

Q And what did he say to you about that?

A He advised me of a meeting he had with Mr. Lerner and he came away quite satisfied that he had received information from Mr. Lerner which made him feel much better about the patent position.

Q And was that conversation which he described to you one which took place after the meeting which you testified to which you held up at National?

A It was after the meeting at National.

MR. GOLDMAN: Thank you.

THE COURT: Was it before the closing?

Q Was it before the closing, Mr. Lazar, before February 3, 1969?

A Yes, before then.

THE COURT: Anything else?

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MR. SCHREIBER: Yes.

RECROSS EXAMINATION

BY MR. SCHREIBER:

Q When Mr. Bloch told us he was satisfied with the results of this meeting with Mr. Lerner, did he tell you what he had gotten from Mr. Lerner that made him satisfied?

A (No response.)

Q Or what Mr. Lerner had said that made him satisfied?

A Nothing specific. Only that he had met with Mr. Lerner and he came away feeling much better about the patent position. I don't think he said the word "satisfied." He was feeling much better about it.

Q And this was after the November 25th meeting that he said --

A I can't be sure. It was after the meeting which we had at National.

Q It was after the meeting which you had at National?

A Yes.

Q And that was November 25th of '68?

A No.

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MR. COLDMAN: No, that's not the testimony.

Q Pardon me. That was in November of '68?

A Early November, yes.

Q In this talk to you about being much better satisfied as a result of his conference with Mr. Lerner did he tell you specifically what Mr. Lerner had said?

A No, he wasn't any more specific than what I have just mentioned.

Q Did he refer to anything that Mr. Lerner had shown him?

A No, he did not.

Q Did he refer to anything that Mr. Lerner had given him?

A No, he did not.

MR. SCHREIBER: No further questions, your Honor.

THE COURT: Anything else from Mr. Lazar?

MR. GOLDMAN: No, your Honor.

THE COURT: You are excused. I will resume at 2:15, gentlemen.

(Luncheon recess.)

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AFTERNOON SESSION

(2:15 p.m.)

MR. GOLDMAN: Your Honor, at this time I would simply for the sake of the record like to offer the last few exhibits which we would like to put in on our case which had been objected to and request that the court rule on those exhibits.

THE COURT: All right. Which ones are these?

MR. GOLDMAN: They are exhibits numbered 54 through 61.

They have been objected to on the grounds of relevance, and they are, in fact, publicity brochures, newspaper clippings, and so forth, showing the scope of the press conference in 1956 which resulted in the declaration of nullity of this patent.

We believe that they are relevant to this case to the extent that they are capable of -- that they will show Mr. Lerner's knowledge by inference of the events at the press conference --

THE COURT: Isn't Mr. Lerner going to testify?

MR. CARR: He is.

THE COURT: Why don't you save them for

possible use on cross examination.

I think the scope of the press conference may be relevant in that it may tend to be proof of knowledge by Mr. Lerner that this event occurred.

However, the real gist of the problem is the sale of the device, isn't that so?

MR. GOLDMAN: I'm not sure I follow your Honor's train of thought.

THE COURT: As I understand, the device was sold more than a year prior to filing.

MR. GOLDMAN: Well, your Honor --

THE COURT: Thete is no question that National sold the device, is there?

MR. GOLDMAN: But, your Honor, the selling of the device, as well as the press conference at which the device was offered for all, both of those things would invalidate the patent and the press conference is of particular importance because Mr. Lerner was there as he has stipulated.

THE COURT: All right.

MR. GOLDMAN: But may I offer one exhibit at this time then and I will follow your Honor's suggestion with respect to the rest for cross examination, and that is Exhibit 54 which is an article which the

patent examiner referred to in a letter written to National Radio Company in which he asked the question of whether there was a prior public use or sale, and National wrote back and said there was not. And that is objected to on the ground of relevance, your Honor. We submit that it is relevant not only on the question of Mr. Lerner's knowledge, but also on the question of whether there may have been a fraudulent representation by National to the Patent Office on which we relied in believing that the patent had been created in accordance with the statutory requirements.

THE COURT: I don't know that that latter would help you. I would think probably anything that bears on Mr. Lerner's knowledge is important to this case.

MR. GOLDMAN: Well, your Honor, our position is that Mr. Lerner has no greater rights than National, and if National is guilty of a fraud in procuring this patent from the Patent Office, we believe that that would create a defense against National, if the note was sought to be enforced by National, and establishing that defense, Mr. Lerner could be in no better position.

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THE COURT: The only defenses open to your client, as I understand it, on your own theories of the case, are either failure of consideration or fraud.

MR. GOLDMAN: Breach of warranty as well, your Honor.

THE COURT: You haven't pointed out the warranty to me here.

MR. GOLDMAN: The warranty is contained in the agreement. There is a warranty of full legal title to the items conveyed.

THE COURT: That he has, doesn't he? Nobody else comes up with full legal title on this patent.

MR. GOLDMAN: Well, your Honor, we claim that under the patent law, the applicable patent law and the cases thereunder which are cited in our motion for a preliminary injunction in this case, it is a matter of law, of federal patent law, that there can be no title to avoid patent and there can be no intereest conveyed to avoid patent, and when National warranted that it had full legal title to the patents, and when in fact it didn't because the patent was void, it was a nullity, that was a breach of warranty and that is a --

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THE COURT: I will reserve that for determination on the full trial record.

MR. GOLDMAN: Thank you, your Honor.

THE COURT: All right.

MR. GOLDMAN: Would your Honor accept the exhibit at this time?

THE COURT: Which one, 54?

MR. GOLDMAN: Yes.

THE COURT: What is the objection?

MR. CARR: We will withdraw the objection to hasten this along.

I would like to note on the record that that article is noted I believe on the patent itself.

THE COURT: That is the same article noted on the patent.

MR. CARR: I believe it is, your Honor.

THE COURT: Plaintiff's Exhibit 54 for identification is received in evidence.

MR. GOLDMAN: Now, your Honor, we asked for the requests for admissions. I have a file copy of the requests for admissions. If Mr. Carr would stipulate that this is a copy, I could hand it to the court now and request that it be filed.

THE COURT: All right.

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Give him a chance to look it over. I don't know where the original is but we do have trouble in some of these old cases with papers getting misplaced.

MR. GOLDMAN: I believe these requests were filed fairly recently, your Honor, within the past eight or ten months.

THE COURT: We can't seem to locate it. Maybe we will before the trial is over.

MR. CARR: In a very, very quick glance, and I have no reason to believe it is anything other than what it is said.

THE COURT: Perhaps we should mark it as a plaintiff's exhibit.

(Plaintiff's Exhibit 82 was marked for identification.)

xx THE COURT: If I find the official copy, then of course we would not need it.

MR. GOLDMAN: Your Honor, at this point the plaintiff rests.

THE COURT: You had some depositions of Mr. Lerner that you were submitting as part of your case.

MR. GOLDMAN: Your Honor, I had statements from depositions which I read in as part of our case.

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I would like to reserve the rest of my deposition material for cross examination.

THE COURT: Is there enough in there to show scienter on his part?

MR. GOLDMAN: I don't know if you are talking about common law scienter. I would think that it could be inferred, yes.

THE COURT: All right.

MR. CARR: So that we can be clear, the plaintiff has rested at this time?

THE COURT: That's what I understand.

MR. CARR: That is their total case?

THE COURT: Yes.

MR. CARR: And I understand also that this includes the reading in of any depositions? Because that would also be part of the case.

THE COURT: That's my understanding. And, you see, the other problem which isn't clear to me, I didn't really expect that you would rest so quickly, looking at the pretrial order. Perhaps I ought to have an informal conference with counsel at this time because I think there is a very important open question here and as a practical matter it might be worth while to have a discussion about it.

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(Recess.)

(In the robing room.)

THE COURT: Gentlemen, my understanding is that during the recess we have been having that the parties have been talking directly with each other and counsel have been talking with each other and it seems reasonable at this time to go over until tomorrow morning with the expectation that you gentlemen will be able to use the courtroom here, you will continue your discussions, and if you reach some conclusion, well, that's all well and good. If you do not, then I would expect to go forward on the defendants' case immediately that we start tomorrow morning with no delay. I would expect to go right forward and conclude the taking of evidence here as rapidly as reasonable.

What time tomorrow, Mr. Clerk.

THE CLERK: 10:15.

THE COURT: All right, 10:15. We are continued until 10:15.

I ask you to use the courtroom here and stick around with your clients and talk for a little while longer because I can see that adjusting this controversy might be of interest to both sides.

MR. SCHREIBER: Thank you, your Honor.

MR. GOLDMAN: Thank you, your Honor.

(Adjourned to June 11, 1975, at 10:15 a.m.)

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
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FOLEY SQUARE, NEW YORK, N.Y. 10278

FREQUENCY ELECTRONICS, INC.

vs.

NATIONAL RADIO COMPANY, INC., and
LOUIS LERNER

New York, June 11, 1975,

10:20 a.m.

Trial resumed.

- -

THE COURT: Mr. Schreiber, are you prepared to go forward?

MR. SCHREIBER: I am, sir. I will call Mr. Lerner.

L O U I S L E R N E R, a defendant herein, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SCHREIBER:

Q Mr. Lerner, would you state your present address?

A Since Monday, 800 South Ocean Boulevard, Deerfield Beach, Florida.

Q Mr. Lerner, you are one of the defendants named in this action?

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A Yes.

Q What is your education?

A I went to the public schools in Boston. I am a graduate of the State Teachers College of Bridgewater, Massachusetts.

Q Do you have any education in the field of patents?

A No.

Q Engineering?

A No.

Q What is your principal occupation today?

A I consider myself an investor.

Q In 1968 and 1969 what was your principal occupation?

A I was the principal owner of Lerner & Company, a securities business in Boston dealing largely with other securities firms, and I was an officer and director or chairman of the board and director of various companies.

Q Were you a shareholder in these various companies?

A Yes.

Q Would you have been the largest invidiaual shareholder in each of these companies?

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A Yes.

Q Would you tell us the names of the various companies in 1968 and '69 of which you were the principal shareholder and officer and at the same time indicate the nature of the activities of each?

MR. GOLDMAN: Your Honor, I'm going to object. I think Mr. Lerner's relationship with National Radio Company is what is material in this case, not what else he might have done in this time.

THE COURT: I will take a limited showing but I don't have all day.

MR. SCHREIBER: The only purpose of it is to indicate the multitude of activities.

Q Please be brief.

A Boston Harbor Marina, which sells and rwpairs boats, owns a large block of land on the oceanfront in Boston.

THE COURT: You were a principal of that corporation?

THE WITNESS: Yes, sir, chairman of the board.

THE COURT: All right.

A Brewster Industries, which had a woodworking division and a fiber division used by the furniture in-

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dustry.

Components Corporation of America, which makes components for radio and television, and also has a chemical division.

Coplay Cement & Manufacturing Company, which manufactures cement.

Educator Biscuit Company, which manufactured crackers and cookies.

George E. Keith Company, which manufactures men's women's and children's shoes and retails some shoes.

National Radio Company, manufacturer of engineered ham radio equipment and communication equipment for the military.

Official Industries, which owned films which it distributed to television stations.

Maxon Electronics Company, which made some commercial products but was most heavily engaged in fuses for the military.

Victorian Investment Company, a Canadian-based, nonresident, nonowned investment trust.

Q What was the nature of your position, what was your position at National Company or National Radio Company in this '68-69 period?

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A I was chairman of the board, chairman of the executive committee, and treasurer.

Q Were you a full-time employee?

A No.

Q As to the other companies, was your position similar?

A Yes.

Q What was the nature of your duties and responsibilities at National?

A (No response.)

Q '68 and '69.

A I ran board meetings. As head of the executive committee we sort of siphoned or filtered information and made reports to the full board.

I evaluated management where necessary; came up with additional replacement people.

I worked on public relations for the corporation, managed stockholder meetings, gave consideration to financing recapitalizations, acquisitions, possible mergers, bank loans, making them and repaying them; important programing of product lines and how to use corporate funds; that is among other things.

Q Did you maintain an office at National Company?

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A No.

Q Where was your office in '68 and '69?

A Excuse me. I did maintain an office for Official Films, which was located at 445 Park Avenue.

Q Was that your principal office at the time?

A At that time it was.

Q Did you have any other office at that time?

A Yes. Lerner & Company's offices in Boston.

Q Where did you reside in '68 and '69?

A 80 Park Avenue, New York City.

Q Did you have anything to do with the daily operations, actual operations, of National Company other than to the extent to which you previously testified in 1968 and '69?

MR. GOLDMAN: Objection, your Honor. I think that question calls for a conclusion which is one of the issues in this case that the court will have to decide.

THE COURT: Well, he can answer it. You may cross examine.

Where did you live in 1972?

THE WITNESS: I am not sure, your Honor, but I left Manhattan in about '72 or perhaps early in '73 to move to Florida. I may have still been in

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New York City at the Imperial House.

THE COURT: When?

THE WITNESS: Let's see. I don't know exactly. I think in '72 I was still at the Imperial House.

THE COURT: Where is Frequency Electronics?

MR. GOLDMAN: Frequency Electronics is in the Eastern District; New Hyde Park, New York.

THE COURT: Where was it in January, 1972?

MR. GOLDMAN: The same place, your Honor.

THE COURT: Stop right here, gentlemen. I will take a recess and I will see counsel inside.

(Recess.)

(In the robing room; discussion off the record.)

THE COURT: Gentlemen, the court is concerned by the fact that this witness whom you presently have on the stand, who is a named defendant, and whom the court considers to be a man of substantial business ventures, well educated, well spoken, seems to have a broad experience in the course of what he does, who has testified under oath, as I understand it it, that he was at the time this action was commenced a resident of New York, and therefore the court is

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lacking complete diversity, and on that basis I don't plan to proceed any further, and I am giving consideration to dismissing this action on the court's own motion for want of subject matter of jurisdiction.

Mr. Schreiber, in our short off-the-record discussion here, has indicated to the court that he would like to be able to verify the date of the termination of the man's lease at the Imperial House and I will permit you a telephone call to do that.

However, I would be shocked and surprised if I found that the man testified incorrectly as to where he lived in 1972 in view of his background and his apparent mental acuity, and I would also believe, if he can't give me his home address straight, I would be very dubious about how much weight I could give to any other testimony about this question of being a holder in due course for value without notice of this promissory note. And the critical date, for your information is January 28, 1972, so that I think you are entitled to a brief continuance to verify it, but I must say if that's what he claims, I'm really shocked.

MR. CARR: Would you consider the record a little further, your Honor, and you will note that, in an affidavit that Mr. Lerner filed at or about that

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time, the service that was made on him by the plaintiff in this case was made on that date as he stepped off the plane at LaGuardia coming in from Florida.

THE COURT: That's not conclusive. I have been to Florida myself.

MR. CARR: I am not suggesting it is conclusive.

THE COURT: I would like to find out whether he had that home, as he testified, at the Imperial House.

MR. CARR: Could we have the question read back? Because I think there may have been confusion in the mind of the witness with respect to the word "lived."

THE COURT: I think it should be independently verified. He has been pretty clear about his residence. I think the record is adequate, but I will let you verify it independently.

On the other hand, what can you do with a witness who doesn't know where he was living in 1972?

All right, I will give you a recess to get on the phone and find out when his lease was terminated at the Imperial House.

MR. CARR: That wouldn't be conclusive.

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THE COURT: If that lease was in effect, I'm going to rely on the man's sworn testimony. If the lease was not in effect, I will permit you, Mr. Carr, to show me that the man was mistaken when he testified incorrectly.

MR. CARR: I think, first of all, your Honor, we should put on the record that the question of diversity which has been raised here involved a legal issue, and the legal issue is one of residence. Now, it may be that witnesses can get confused --

THE COURT: You better make use of your time and get on the phone and find out whether that lease was in effect or not. If I find that the lease was in effect, I would have a very dim view on the subject matter of jurisdiction.

MR. SCHREIBER: May I speak of my own knowledge without regard to the date? Because apparently, like Mr. Lerner, I can't remember the exact date but I know that that lease, when it was terminated, was terminated by way of sublease to another tenant.

THE COURT: You find the effective date of the sublease and tell me about that.

MR. SCHREIBER: For that reason I can't be sure that Imperial House will have that record.

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MR. CARR: We will call Florida and find out.

MR. SCHREIBER: I think we can also demonstrate, your Honor, that prior to January of '72 he had purchased and moved into his residence in Boca Raton.

THE COURT: You see, the man testified under oath here and he's a businessman. This is not some seaman coming in off a tanker who got hurt.

MR. SCHREIBER: If I were asked exactly when I moved to Westport, Connecticut I might have some problems too.

THE COURT: Let's not be concerned with your problems. Go out and attend to it, gentlemen.

MR. GOLDMAN: May I make a brief statement?

THE COURT: Yes, certainly.

MR. GOLDMAN: Just to establish the good faith of the plaintiff.

THE COURT: Your good faith is not in question, Mr. Goldman. I wish you wouldn't take that view.

MR. GOLDMAN: Thank y ou, sir.

(Recess.)

THE COURT: Gentlemen, apparently it's taken longer than I really thought it would and I think

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perhaps I ought to resume in consideration of the economy of time.

Does anyone have a definitive answer?

MR. SCHREIBER: I have, sir. I state as an attorney as if it were under oath that I have spoken with Mr. Rolfe, a principal in Sulzberger, Rolfe, Inc. They are the managing agents for the Imperial House about which Mr. Lerner testified.

Mr. Rolfe advised me that Mr. Lerner's last lease was dated May 29, 1968, that the lease terminated September 30, 1970.

However, there is correspondence in the file dated in 1971, in the month of March, a letter dated March 4th, that is an interoffice letter or an interoffice memorandum dated March 4, 1971, and March 26, 1971, and March 30, 1971, all of which refer to restoration work required at the apartment.

There is also a memorandum in the file dated March 25, 1971 indicating that Mr. Lerner and his wife would vacate the apartment on March 31, 1971.

There is a letter in the file addressed by Mrs. Lerner, the wife of Mr. Lerner, saying that the restoration work has been completed. That letter is dated March 30, 1971, and there is acknowledgement of

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that on that date that the restoration work had been then completed.

In addition, I spoke with Mr. Lerner's office in Florida. Could you help me with the name of the man?

THE WITNESS: Robert Cimino.

MR. SCHREIBER: Mr. Cimino read to me a letter dated January 5, 1971 written by Mr. Lerner to Mary Sullivan, then head bookkeeper in Mr. Lerner's Boston, Massachusetts office, in which Mr. Lerner stated to Miss Sullivan, who handled his personal bookkeeping affairs, that he has official notice from the State of Florida that as of January 5, 1971, the State of Florida recognizes him as a resident of the State of Florida. The purpose of that recognition, sir, is to give him certain tax advantages as a resident in the State of Florida.

THE COURT: All right.

MR. SCHREIBER: Thank you, your Honor.

L O U I S L E R N E R resumed.

THE COURT: You may continue the examination of this witness.

MR. SCHREIBER: If I may just pursue that for a moment, your Honor.

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BY MR. SCHREIBER:

Q Mr. Lerner, about when did you buy your home in Florida?

A Many years ago. Perhaps seven or eight.

Q For a period of years were you commuting to and from New York and Florida?

A Many, many trips.

Q And you finally departed your apartment in New York when you gave up the premises on March 31, 1971?

A Yes.

Q And ever since then Florida has been your place of residence?

A Yes.

Q Thank you.

Now, Mr. Lerner, we come to your meetings with Mr. Bloch. When did you first meet Martin Bloch?

A In July of 1968.

Q How did that come about?

A I received a call from Gideon Cashman of the Pryor firm suggesting that it might be of some advantage to me to meet with Mr. Bloch.

Q At that time what was your relationship, if any, with Mr. Cashman?

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A He personally, and his firm, performed some services for Official Films, now known as Official Industries.

Q They were counsel to the firm?

A That's right.

Q Did you then know or did you later find out what Mr. Cashman's relationship was, if any, to Frequency?

THE COURT: Is it important.

MR. SCHREIBER: Well --

THE COURT: Is it?

MR. SCHREIBER: I can do without it, your Honor.

THE COURT: I would think so. He acted as the finder in this transaction and was made paid, wasn't he?

MR. SCHREIBER: Precisely.

THE COURT: And if I am not mistaken, he was paid by National.

MR. SCHREIBER: That's correct.

Q At your first meeting with Mr. Bloch, where did that take place?

A At my New York office.

Q Anybody else present?

A No.

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Q Will you tell us the substance of the conversation at that meeting?

A I explored with Mr. Bloch the possibility of merging the two firms, Frequency and National, which of course did not mean that I was interested in doing it, as I said, because it was an exploration.

Furthermore, I learned from Mr. Bloch that he expressed some interest in the acquisition of National Radio Company's Atomichron product line and/or things pertaining to the Atomichron business.

Q Do you recall anything else that was mentioned or discussed at that first meeting?

A My own reaction was rather negative.

MR. GOLDMAN: Objection.

THE COURT: Sustained. Strike out the answer.

The question is permissible. The answer is stricken as nonresponsive.

Q Do you recall anything else being discussed at that meeting?

THE COURT: Yes or no.

A Yes.

Q What else?

A There was mention of patents, which was lightly

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discussed.

Q What was said about that by either of you?

A Mr. Bloch was interested to know about patents. I expressed the opinion that we did have patents but I refused to comment on the strength of the patents or the meaning of the patents and suggested that he continue his interest, if any, on that subject by having discussions with operating people of the company.

Q Was any mention made of any specific patent?

A I don't recall.

Q Have you completed your statement of the full discussion at that first meeting?

A Yes. I suggested to Mr. Block that if he had any interest in pursuing that subject, to go directly to the people like Oddi and other officers of the company, but primarily it could have been Oddi.

Q Did you have any further meeting with Mr. Bloch?

A Yes. Several months later.

Q Where?

A At the same office.

Q How did that come about?

A Calls from Mr. Cashman, who suggested again

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that perhaps there was something that could come out of meetings with Mr. Bloch.

Q Was there such a meeting?

A There was.

Q Who else was present?

A Bloch and Cashman.

Q Will you tell us the substance of the discussion at that next meeting?

A I don't recall any substance that appeared then to me to be material, nor do I at the present moment recall anything of material interest.

Q Did you have any further meetings or phone calls with Mr. Bloch?

A I have a vague recollection of a telephone call, and there possibly was a meeting, but again I can't recall anything of material value coming out of either the phone call or the other possible meeting.

Q Between the date of your original meeting with Mr. Bloch, which you said was in July of 1968 and the closing of the transaction on February 3, 1969, did you meet with anybody else of management, or representing Frequency?

A No.

Q Did you have any telephone conversations

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with anybody in management or representing Frequency in that same period?

A Unless it was Cashman.

MR. GOLDMAN: Objection, your Honor.

THE COURT: I will allow the answer to stand.

Q In that period between July, 1968, the day of your first meeting with Mr. Bloch, and the closing of the transaction on February 3, 1969, did you discuss with anybody at National anything having to do with the validity or invalidity of any National patents?

A No.

Q The same period, in that time, did you discuss with anybody at National specifically the Zacharias patent or its validity or invalidity?

A No.

Q Did you have any discussion in the same period with anybody at National concerning the essential nature of the Zacharias patent for the use of or the production of the Atomichron product?

A No.

Q In the same period did you have any discussion with anybody at National concerning Hewlett-Packard and its possible production of items using devices which

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would infringe upon patents owned by National?

THE COURT: Would you give me that time period again?

MR. SCHREIBER: The period between the first meeting, which we have otherwise established as July 30, 1968, with Mr. Bloch and the closing, which is February 3, 1969, sir.

THE COURT: These are discussions with National?

MR. SCHREIBER: Anybody at National.

A To the best of my knowledge, and I can't say precisely where or from whom, I learned that Hewlett-Packard may have been infringing.

Q In that period did you ever see any claim letter, or other letter, any letter, addressed by anybody at National to Hewlett-Packard or anybody at Hewlett-Packard?

A Definitely not.

Q Now, turning to Frequency, Mr. Lerner, in that same period, did you discuss with anybody at Frequency anything having to do with the validity or invalidity of any National patents?

A No.

Q Specifically, the Zacharias patent.

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A No.

Q Did you have any discussion in that period with anybody in the management or representing Frequency as to the essential nature of the Zacharias patent?

A No.

Q In order to have the Atomichron produced?

A No.

Q In that period did you discuss with anybody in Frequency's management or representing Frequency anything having to do with Hewlett-Packard's possible infringement of patents owned by National?

A No.

Q Did you discuss with anybody in that same period, anybody at management of Frequency or representing Frequency, any claim to be made upon Hewlett-Packard for patent infringement?

A No.

Q Mr. Lerner, I turn now to the matter of your purchase of notes by Frequency payable to the order of National. Did you purchase such notes?

A I did.

MR. GOLDMAN: Objection, your Honor, on the question --

THE COURT: Isn't it conceded that he pur-

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chased it?

MR. GOLDMAN: Well, he purported to make an acquisition. What it was is something which --

THE COURT: All right. You will have a chance to cross examine.

Q Did you pay for those notes?

A I did.

Q What did you pay for them?

A $323,000.

Q What were the notes purchased? What was the principal amount of the notes purchased?

A There was one note for 200,000, and another for $325,000.

Q Do you recall the balance due on the $325,00- note at the time of your purchase?

A Yes.

Q What was it?

A $272,000.

Q At the time of your purchase of the note, where was the note physically located?

A At the Middlesex Bank of Everett, Massachusetts.

Q For what purpose?

A It had been there as collateral for a loan to National Radio Company.

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Q When you purchased the note from National --

MR. GOLDMAN: Which note?

Q The notes to National, was National's loan from Middlesex repaid?

A It was.

Q What happened to the note physically?

A It stayed at the bank but perhaps -- stayed at the bank as collateral among other -- with other collateral against the loan which I then made about that time in the amount of $400,000.

Q Were the proceeds of that loan used in whole or used in part to pay for the purchase from National?

A They were.

Q How long did that note remain at Middlesex?

A I believe at the end of March I paid off my loan.

A March of what year?

A March of '71. I paid off my debt at the Middlesex Bank and that bank released that note plus other collateral, plus other papers which went with the note to, I believe there were mortgage papers or collateral papers, my Boston office..

Q Did National, at the time of your purchase of the note or notes, execute any papers transferring

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these notes to you?

A Yes.

Q What happened to those papers? When did you get them?

MR. GOLDMAN: Your Honor, objection. I don't know what papers counsel is referring to.

THE COURT: Aren't these papers among the agreed exhibits.

MR. SCHREIBER: They are, sir.

MR. GOLDMAN: I don't know what he's referring to, sir.

THE COURT: I don't either, but if the exhibits have been stipulated by the pretrial order, let's just offer them in evidence.

MR. SCHREIBER: I will offer in evidence Defendants' Exhibit A.

MR. GOLDMAN: Your Honor, I am going to object to Defendants' Exhibit A unless counsel states for what purpose it is being offered.

THE COURT: All right. You may state for the record what it is being offered for.

MR. SCHREIBER: Defendants' Exhibit A is the chattel mortgage --

THE COURT: Well, just answer counsel's

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question.

MR. SCHREIBER: It is being offered to identify the paper which Mr. Lerner said went with the promissory note and came to him with the Promissory note from Middlesex.

THE COURT: I believe this defendant may show on this trial order all of the surrounding circumstances affecting his acquisition of the note, including the nature and extent of any agreement in existence between National and the bank and any papers the bank was holding, the Middlesex Bank.

I will overrule the objection. Exhibit A will be received in evidence.

MR. GOLDMAN: Your Honor, I am examining Exhibit A now. Exhibit A has attached to it, in the binder in which it is being offered, some UCC financial statements.

THE COURT: That's supposed to be Exhibit B, isn't it?

THE CLERK: Right.

MR. GOLDMAN: Your Honor, if it is Exhibit B, I had objected to --

THE COURT: It's already marked separately as Exhibit B.

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MR. GOLDMAN: Your Honor, I had never seen this document in this form with these documents attached, and I objected to Exhibit B I believe on the grounds of authenticity.

THE COURT: My pretrial order shows the only objection to B is on relevance and materiality. I show no objection as to authenticity here, and ordinarily a document as to which there is an authenticity objection is not listed in our pretrial orders because proving authenticity can take time.

MR. GOLDMAN: Your Honor, I am checking here to see --

THE COURT: All right, B is not being offered now anyway. You will have an opportunity to check out B when it is offered. I will overrule the objection to A and it is received in evidence.

Let's go forward.

(Defendants' Exhibit A was received in evidence.)

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THE COURT: Do I understand the witness to state that he received this from the bank at some point in time?

MR. SCHREIBER: That's right.

Q Is that correct, Mr. Lerner?

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A I didn't personally but my office in Boston did.

Q I show you what appears to be the original promissory note executed by Frequency in the sum of $325,000 payable to the order of National Radio Company, Inc., dated February 3, 1969, a copy of which has already been put in evidence as Plaintiff's Exhibit 3, together with a document dated April 9, 1970, captioned "Assignment of the $325,000 note," a copy of which is already in evidence as Plaintiff's Exhibit 13. I ask you if these are the papers that were transmitted to you as you have testified.

THE COURT: Would you mark them for identification before showing them to the witness, please. Separately or together.

MR. GOLDMAN: They can be marked together, sir?

MR. GOLDMAN: Your Honor, I think they should be marked separately and it is very important in this case.

THE COURT: All right, they may be marked separately if any attorney here wants that done.

MR. GOLDMAN: Thank you. And, your Honor, I want the back marked separately also.

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MR. SCHREIBER: That's satisfactory too, your Honor.

THE COURT: All right.

(Defendant's Exhibits P, Q and R marked for identification.)

MR. SCHREIBER: P being the note and Q the document captioned "Assignment" and R being the blue back.

THE CLERK: Right.

MR. SCHREIBER: May I hand this to the witness, your Honor.

THE COURT: Yes, certainly.

Is there an open question?

Q Mr. Lerner, as to P, which is the note, I believe you testified that that went from Middlesex to your office in Florida. Where did the next go?

A No, not so.

Q Pardon me. To your office in Boston?

A Right.

Q Where did the next go?

A It went to my office in Florida.

Q When was that?

A When? It was shortly after it was paid off, after my note was paid off, which would have placed

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it in April of '71 or thereabouts.

Q As to Q, which is the document that's marked and captioned "Assignment," when did Middlesex send that to yo, your office?

A That went to my Boston office too. I'm sorry. It went to my Boston office and then it and the note were sent down to my office in Florida.

Q What happened to P & Q in Florida?

A I used it as collateral plus other collateral against the loan at the First Bank & Trust Company in Boca Raton, Florida.

Q Did First National Bank in Boca Raton, Florida get both P and Q?

A Yes.

MR. GOLDMAN: Objection.

THE COURT: I will sustain the objection unless he knows.

Q Do you know whether both P and Q were deposited with the Boca Raton bank?

A Yes, they were.

Q How long did they stay with that bank?

A About the time when the February, '72 payment from Frequency, which was due in the amount of $32,500, was not made and I learned of a suit to come. The

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bank advised me they didn't regard the note as suitable collateral, at which point I asked to have it back.

Q Did you get it back at that time?

A Yes.

Q By "it" you refer to both P and Q?

A Right.

Q What then happened to P and Q?

A Robert Simonoff, who has been referred to who workes in my Florida office, put it in a vault at the First Bank & Trust Company, a personal vault.

Q How long did it stay there?

A Until --

Q Did they stay there, I should say?

A Until late November of '74.

Q What then happened?

A Mr. Carr said he needed it in order to -- as part of the activities of this suit, and these papers were mailed up to Mr. Carr's office except that they didn't have this blue stuff. It was the essential papers here.

Q Referring to R, which is the blue back before you, it didn't have that?

A It didn't have that. There was also the collateral, the papers with regard to collateral that

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went up to him.

Q Are you referring, by those additional papers as collateral, to Defendant's Exhibit A?

A Yes.

Q When you sent P and Q to Mr. Carr, except for the absence of the blue back, which is R, when you sent him P and Q, were they in the same form attached together as they are here?

A Yes.

Q Mr. Lerner, I show you a letter dated January 31, 1972, described by Mr. Goldman of Pryor, Cashman, addressed to First Bank & Trust Company of Boca Raton, and a letter dated February 2, 1972 addressed by the First Bank & Trust Company of Boca Raton, addressed to you.

MR. SCHREIBER: Which I would like to have marked for identification.

Q And I would ask you whether you saw them at or about the time that they are dated?

MR. GOLDMAN: Your Honor, these documents aren't referred to in the pretrial order. They weren't part of the discovery in this case.

THE COURT: What are they offered to show?

MR. SCHREIBER: Just to substantiate what

he said on the stand, your Honor.

THE COURT: If the veracity of that particular statement he has made is questioned on cross-examination, I will permit you to bring these documents in on redirect examination solely as bearing on his credibility. They should be marked for identification, however.

MR. SCHREIBER: Thank you, your Honor.

Would you mark them in chronological order, please?

THE COURT: I don't understand that the plaintiff disputes that he got it back from the bank after the payment was made. You don't dispute that, do you?

MR. GOLDMAN: We have no knowledge which would permit us to dispute it, your Honor.

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(Defendant's Exhibits S and T marked for identification.)

Q Mr. Lerner, when did you first hear that there was any claim of invalidity of any of the patents transferred by National to Frequency?

THE COURT: Stick to Zacharias, won't you, please?

MR. SCHREIBER: Very good, sir.

Q When did you first hear that there was any claim by Frequency that the Sacharias patent was invalid?

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A Only when the suit began.

MR. GOLDMAN: Your Honor, I would like to establish, because I want to make sure I haven't missed it, that the document in front of Mr. Lerner at this time has not been admitted into evidence yet.

THE COURT: Is there a document in front of Mr. Lerner?

Mark it for identification, any document that is in front of the witness.

THE WITNESS: It think it has been identified.

THE COURT: What is the number of it?

THE WITNESS: A, P. Q and R.

MR. GOLDMAN: P, Q and R have not been admitted yet, is that correct?

THE CLERK: That's right.

MR. SCHREIBER: I would offer them in evidence, your Honor.

MR. GOLDMAN: I object to the introduction of P, Q and R in evidence in that form, your Honor.

There has been no foundation laid for how the document got in that form, and in particular, how the blue back got on it.

And I would like to read, as part of my objection, your Honor, the statement of Mr. Carr taken on the examination

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of Ray D. Horner on November 27th, 1974.

THE COURT: Hand the deposition up to the court and show me the line and page number.

MR. GOLDMAN: It is not marked by line and page. I'm sorry, your Honor.

THE COURT: All right.

MR. GOLDMAN: But I would ask you to read Mr. Carr's statement.

THE COURT: Isn't there a page number?

MR. GOLDMAN: There is a page number but not a line number.

THE COURT: Page 25 of the deposition taken on November 27th, 1974 of Ray Horner.

(Pause.)

THE COURT: You see, I understood this witness to testify that these documents were not contained in a blue back which has been marked separately, which--

MR. GOLDMAN: But, your Honor--

THE COURT: Please. One at a time.

--which has been marked separately as Exhibit R for identification, and I don't see anything inconsistent between the witness's testimony, Exhibit R for identification being put on by the lawyers after the notes were received back from the Florida bank and the statement of Mr. Carr

on the record on page 25 of the deposition. He, there, states, "I have told Mr. Goldman that the blue back was prepared by me in this office this morning."

MR. GOLDMAN: That is not the crux of the problem, your Honor.

Let me explain to the court the problem and then I would request that the court permit me to examine the underlying problem.

The defendant has alleged in its brief that it has the status of a holder in due course, it being in effect an endorsee of the note by reason of the fact that the note and the assignment are so fastened together as to constitute--

THE COURT: The record is clear that the blue back was put on,after the controversy arose,by one of the attorneys.

Now, you will have a chance to cross-examine him so I will receive in evidence Exhibits P and Q. I will not receive R in evidence because it is not relevant.

MR. GOLDMAN: May we examine the document at this time, your Honor?

THE COURT: Yes. I want the testimony to continue. Haven't you seen this before? You saw this in the deposition of Mr. Horner.

MR. GOLDMAN: I didn't see it when the point of law was raised with respect to the significance of the note and the assignment being attached.

THE COURT: All right. There shouldn't be any mystery.

(Defendant's Exhibits P and Q for identification received in evidence.)

Q Mr. Lerner, have you placed the note, here marked P, in the hands of your attorneys for collection?

A Yes.

Q And collection is being sought here in this lawsuit?

THE COURT: The court knows that.

Q Have you incurred legal fees in connection therewith?

A Yes.

Q Approximately how much have you been billed to date by both Mr. Carr and by my office?

A Approximately $30,000.

Q Have you been given some indication as to the extent of your additional fees through this trial?

A I have been advised that a similar amount would likely be also due.

MR. SCHREIBER: If I may have just one second,

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your Honor.

(Pause.)

MR. SCHREIBER: No further questions, your Honor.

CROSS-EXAMINATION

BY MR. GOLDMAN:

Q Now, Mr. Lerner, is it your testimony that Exhibit P, the promissory note, and Exhibit Q, the assignment, came into your possession from the Middlesex Bank?

A Yes.

Q They did not come into your possession from National Radio Company, is that correct?

MR. SCHREIBER: Will you give the document to the witness, please?

A Yes. It was the bank which took over the note as collateral after National Radio discharged its debt to the bank.

Q Am I correct that the instrument of assignment, Exhibit Q, was not physically delivered to you prior to the time that you received it from the bank in 1971, as I believe you testified?

A To the best of my knowledge, both pieces were delivered to my Boston office by the bank.

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A Now, Mr. Lerner, do you recall when the bank sent you the note and the form of assignment, whether you received a transmittal letter from the bank?

A (No response.)

Q You don't recall?

A I don't recall.

Q I hand you a document dated March 1, 1971 bearing the heading "Middlesex Bank" and which is addressed to you, sir--

THE COURT: Mark it for identification.

MR. CARR: That has been marked Defendant's Exhibit E for identification, your Honor.

THE COURT: All right.

Q I ask you, sir, if, upon reading that letter, your recollection is refreshed as to whether the bank sent it to you at the time the note as to the assignment was received.

MR. SCHREIBER: Can I suggest that the question be more accurately phrased?

THE COURT: I find no objection to the question. If the witness doesn't understand it, he can say so.

THE WITNESS: I would like to respectfully point out to Mr. Goldman that this letter was not addressed to me. It was addressed to my nephew, Steven Lerner, who worked for me in the Boston office and made contact with

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banks.

Q I'm sorry, Mr. Lerner, that may not be the--

THE COURT: What paper was it that the witness was looking at?

MR. GOLDMAN: Your Honor, this is Exhibit E.

THE COURT: You see, the pretrial order refers to Exhibit E as being a letter from the Middlesex Bank, N.A. to Louis Lerner.

MR. GOLDMAN: It is that letter, your Honor.

Let me call the court's attention to the fact that it says "Attention Mr. Steven Lerner." That was the thing that was causing the confusion.

THE COURT: All right.

Q You say it was not addressed to you; it was addressed to you, attention of your nephew.

A Yes.

Q Did you receive this letter on or about March 1, 1971?

A I don't recall.

Q Were you advised of it by your nephew?

A I don't recall.

Q Now, this letter says "Dear Mr. Lerner: We have enclosed the following:" It refers to various items including the note of $325,000."

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I see no reference in this letter, Mr. Lerner, to the assignment. Do you see such a reference?

A No, I do not.

Q But it nevertheless remains your recollection that you received the note and you assigned it, from the bank, at the same time?

A That was my understanding from the conversations with people who worked for me.

Q In other words, your understanding that you received it at the same time is based on information that people in your company gave you, correct?

A Yes.

Q Not that the bank gave you?

A People at my company did; right.

Q Do you know, sir, what their understanding was based on?

A (No response.)

Q Since the letter was addressed to you?

A Yes. Their understanding would be based or was based on the fact that they handled physically these papers as I have testified. I saw the papers in November of '74 for the first time. That's what I testified.

Q So, then, the bank would have enclosed the assignment and the note but would have referred only to the

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note and the letter, correct?

A I can only assume so.

MR. GOLDMAN: Your Honor, I would like to offer this document in evidence as a plaintiff's exhibit.

MR. SCHREIBER: No objection.

THE COURT: All right. Do you want it re-marked?

MR. GOLDMAN: Yes, please.

THE COURT: Mark it.

xxx (Defendant's Exhibit E for identification received and marked Plaintiff's Exhibit 83.)

Q Mr. Lerner, can you recall the first time you personally saw the note and the assignment after it was received from the Middlesex Bank?

A In November of 1974 at my Florida office.

Q That was the first time you saw it?

A Yes, sir.

Q And were the note and the assignment physically attached in any way?

A Yes, they were.

Q Do you know how they became attached?

A They were stapled.

Q No. That is not my question.

My question is, how did they become attached?

A I don't know.

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Q You don't know who attached it?

A I don't

Q It could have been attached at any time prior to that November of 1974 date that you saw it, right?

A Any time?

Q Any time.

A Yes, any time.

Q What was the form of the attachment, a staple?

A A staple.

Q How many staples?

A Some, I think, are set at the top left corner and another at the top of the right corner.

Q There was more than one staple?

A I can't be sure.

MR. GOLDMAN: May I see the note?

(Pause.)

MR. GOLDMAN: Forgive me; I think I have it here.

Q Mr. Lerner, as I look at this, I see something that looks like staple holes in the lefthand corner. I don't see anything in the righthand corner. Do you see any such thing?

A I do now.

Q There is no staple in the lefthand corner?

A I see three staple holes and staples on the top.

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Q That is in the blue back.

THE COURT: This is non-productive. The court can see the same holes just as well as anybody else can.

Pass the exhibit to the court, please.

Now frame your next question.

Q Mr. Lerner, when did you first become associated with National Radio Company?

A About 1955.

Q And did you become an officer of National Radio Company at that time?

A I became a director and treasurer.

Q Were you chairman of the board in 1955?

A I think not. I'm pretty sure I was not.

Q You were, however, chairman of the board and treasurer, and chairman of the executive committee as well, were you not, at the time that National undertook development of the Atomichron project?

A No.

Q You were not?

A I was not chairman of the board. I may have said that in my deposition but going back, I recall there was a Mr. Cosgrove who initially became chairman of the board. Mr. Cosgrove was one of the top executives and recent left AVCO.

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Q Well, in fact, you did say you were chairman of the board, Mr. Lerner. I refer to your deposition given in this case on April 19, 1972, page 73, line 11.

"Q Now, Mr. Lerner, were you an officer of National Company at the time that it undertook the development of the Atomichron product line?

"A Yes.

"Q What office did you hold?

"A Chairman of the board and treasurer."

You now say, Mr. Lerner, that that was not correct?

A I am saying that that is not correct.

THE COURT: On what date did you become chairman of the board?

THE WITNESS: I don't know exactly, your Honor, but there were two people who were chairmen of the board before I became chairman of the board.

THE COURT: What were you with respect to National when it began to develop the Atomichron?

THE WITNESS: I was the largest stockholder? I was treasurer and a director.

Q Mr. Lerner, you say now that you were not chairman of the executive committee at that time also?

A It's so long ago I'm not sure that we had an

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executive committee back then.

Q May I refer, sir, to your deposition given on the same date, page 74, line 5:

"Q You were chairman of the board of directors, you say, at that time?

"A Yes.

"Q Were you also chairman of the executive committee, do you know?

"A Yes."

You now say, sir, that that was a mistake also?

A Probably.

Q Well, regardless of what positions you held at that time, did you participate in the development of the Atomichron product line as a member of the board of directors?

A Surely.

Q And did you participate in conversations with Dr. Zacharias?

A Yes.

Q And with Jerome Weisner as well?

A Yes.

Q And Dr. Zacharias was on the board of directors of National Radio Company, was he not?

A Yes.

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Q Now, was it the normal custom of management at that time to request reports on product development?

A Yes.

Q And did you see such reports?

A Such reports were not necessarily in writing.

Q Do you recall whether such reports customarily would be in writing?

A I recall that more likely they would be given orally.

Q Well, if they were given orally, would you have been present when they were given to the board of directors?

A Yes.

Q And did you vote at and participate in all decisions relating to the development and marketing of National's products at or about that time?

MR. SCHREIBER: All decisions by the Board, sir?

MR. GOLDMAN: All decisions; yes.

A I participated in all board matters.

MR. GOLDMAN: I don't think that that is responsive to the question.

THE COURT: I do. As far as I am concerned, he is the biggest shareholder and he is treasurer, and he is a director. I assume he conducts his affairs in a business-like fashion, and whatever they were doing, he was

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in on it. I don't think there is anyone that disputes that. That's true, isn't it?

THE WITNESS: Very true.

THE COURT: All right.

MR. SCHREIBER: It is conceded, sir.

Q Now, Mr. Lerner, did you attend a press conference on October 3rd, 1956 at the Overseas Press Club?

A Yes; briefly.

THE COURT: You see, there you are. You have his attendance conceded in a pretrial order.

MR. GOLDMAN: Your Honor--

THE COURT: Listen to me now. You are a young lawyer, and you are going to try other cases in this court. You got a fact that is conceded. You are cross-examining the witness and you give him a wide open opportunity with a question like that and he answers "Yes; briefly" so you are wasting your time on your cross-examination, and you didn't help your client because of the answer that you got.

MR. GOLDMAN: Your Honor, there was a point to my asking that question.

THE COURT: He gave you the point. He was only there briefly.

MR. GOLDMAN: And I was about to move to strike

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that response as non-responsive.

THE COURT: Unnecessary questions bring forth non-helpful answers. The record will stand. Motion denied.

Q Have you testified under oath in a proceeding in the District of Massachusetts brought by this plaintiff against various defendants including the patent law firm of Kenway and Jenney?

MR. CARR: For clarification, you mean testify in a proceeding?

Q Did you testify at a deposition? Did you give a deposition?

A Yes.

Q And that deposition was given on about November 30, 1973, is that correct?

MR. SCHREIBER: Will you show him a copy of that, please?

THE COURT: Won't you concede the date?

MR. SCHREIBER: We concede it, your Honor.

THE COURT: All right, it is conceded.

Q And in that deposition, Mr. Lerner, did you not testify that you did not attend the Overseas Press Club meeting on October 3rd, 1956?

A I don't recall.

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Q I call your attention, Mr. Lerner, to page 48 of the transcript of that proceeding in which the question is asked:

"Q Have you any recollection of a press conference? Have you any recollection of a press conference at the Overseas Press Club in New York which concerned in any way the Atomichron?

"A Yes.

"Q Were you asked about that in connection with your recent deposition"--referring to the New York case?

"A I don't believe so.

"Q Do you know the date of this press conference at the National Press Club?"

THE COURT: Is it the National Press Club or is it the Overseas Press Club?

MR. GOLDMAN: It was referred to as the National Press Club, your Honor.

THE COURT: No more about it. Let's go on to something else. It is conceded on the record that he was at the Overseas Press Club.

MR. GOLDMAN: I want to establish that the witness testified in a deposition in this case that he was present, and then he testified a year later that he was not present.

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MR. SCHREIBER: The testimony was "I don't recall."

THE COURT: I won't take it. No more on that. The scope of cross-examination is addressed to the discretion of the court. Move on with this.

Q The atomic frequency standard was on display at the press conference, was it not?

THE COURT: That is conceded. No more cross-examination about conceded matters. He was there. It was on display, and he saw it, and I so find.

Q And Mr. Lerner, Mr. Schreiber is sitting right here, and he was present at the press conference also, was he not?

A Yes.

Q And Mr. Carr's partner, Mr. Bilodeau, was also present at that press conference, was he not?

A Yes.

Q You described it it in your deposition as a "real little party," didn't you?

A Yes.

Q Isn't it a fact that the reason why you didn't remember this after you had testified to it in the deposition in this case when you were questioned about it in Massachusetts was because you didn't want to give answers

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on it in the Massachusetts case?

MR. SCHREIBER: Objection.

THE COURT: Sustained.

Q Mr. Lerner, you have held various offices with National throughout the period of 1956 to 1959; is that correct?

A '56 to '59?

Q Through "69. I'm sorry. The date of the Frequency transaction.

A Yes.

Q And you did, at least during some point in that period, hold the office of president, did you not?

A President pro tem, to the best of my knowledge for a very short period while we were looking to replace a president who had resigned.

Q That period was when?

A I can't say exactly. I think it was at that time when Frank Oddi resigned who was later replaced by Ray Horner.

Q Do you know why Mr. Oddi resigned?

A Certainly I do.

THE COURT: What are you offering it for?

MR. GOLDMAN: I am offering it to show that Mr. Oddi resigned because Mr. Lerner interfered with his

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functioning in his office as president of National Company.

THE COURT: The man owned 35% of the stock.

MR. GOLDMAN: He testified he didn't involve himself in the day to day activities, and I think that's important.

THE COURT: All right. I will permit it to be asked.

THE COURT: Frame a new question along those lines.

Q Do you know why Mr. Oddi resigned as president of National Radio Company?

A I think largely because the board was not happy or completely happy with the results we were getting, and we found Mr. Horner, and we tried to work an arrangement where we wouldn't lose Mr. Oddi because he did have a lot of value to us in some ways, and we wanted Mr. Horner to be the chief operating executive.

Q Did Mr. Oddi ever express to you, in words or substance, that he resigned because you personally, sir, were interfering in his functions as president of the company?

A Absolutely not.

Q Did he ever express to you, in words or substance, that he resigned because Mr. Horner had been hired by you

and was pushing him out of his responsibilities as president?

A That's not a correct statement, but I will answer it directly.

He had not expressed that idea.

Q He did not express that idea?

A No.

Q Have you read his deposition given in this case?

A No.

Q I refer to the deposition of Mr. Oddi taken on November 27th, 1974 in this case, page 57. I can't refer to a line because it is not identified as such.

"Q Now, you mentioned that Mr. Lerner brought in a man to run the company. I think that was your phrase.

"A Generally correct.

"Q Could you tell me who that man was and when this happened?

"A This was Mr. Horner who was brought into the company in or about mid 19--about August, I believe, 1968.

"Q I see. Now, Mr. Oddi, you described your responsibilities with National Radio Company as being particularly related to acquisitions and divestitures of assets, corporate combinations, and so forth; is that correct?

"A That is correct."

THE COURT: Excuse me just a moment. Was he

present when this deposition was conducted--this witness?

MR. GOLDMAN: He was not present. His counsel was present, your Honor.

THE COURT: You see, if he wasn't present--Was National being deposed by Mr. Oddi in his absence? I don't think the statements of Mr. Oddi can be offered as admissions by this witness.

MR. GOLDMAN: I am only offering them for the purpose of challenging Mr. Lerner's credibility as a witness.

THE COURT: I don't know that you can do it that way.

MR. GOLDMAN: May I continue to read in the portion of the record that--

THE COURT: No. Mark it for identification.

MR. GOLDMAN: Thank you, your Honor.

THE COURT: His credibility can't be tested by what somebody else testified. His testimony isn't binding on this witness. Besides, it is a collateral question anyway.

If you want to bring in Mr. Oddi and have him testify, you may do that. If you can show an excuse for his non-appearance, you can probably read his deposition if it is relevant, but not for impeachment of this witness.

xxx

(Plaintiff's Exhibit 84 marked for idenfication.)

MR. CARR: That is the complete Oddi deposition?

THE COURT: So I understand.

MR. GOLDMAN: Yes. I am offering only that section of it, your Honor.

THE COURT: Well, you see, you are not in a position to offer it at this time?

MR. GOLDMAN: No, I am not offering it. I am only marking that section.

THE COURT: You can take that up with me. What I am saying is that you may not use it to impeach this witness in view of the fact that he wasn't there when Oddi testified, so it can't be an admission on his part.

MR. GOLDMAN: Your Honor, I only mark it for identified for that purpose and in that limited area.

THE COURT: All right, I decline to take it. I am not precluding you from offering it as a substantive piece of evidence on your rebuttal.

MR. GOLDMAN: I understand, your Honor.

THE COURT: Let's go forward.

Q Now, in the period beginning in the summer of 1968, Mr. Lerner, Mr. Oddi was president of the company, is that correct?

A (No response.)

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Q Had the office of president of the company?

A Yes.

Q And you, at that time, sir, were chairman of the executive committee, were you not?

A Yes.

Q And you were chairman of the board of directors at that time?

A Yes.

Q And how frequently did the board of directors meet?

A I'm not sure. There were times when we would meet monthly; other times we would meet every second month.

Q How frequently did the executive committee meet?

A Almost always the day before the board meeting. At times there would be special meetings of the executive committee.

Q Mr. Lerner, I refer to your deposition of April 19, 1972, page 55, line 5.

"Q Do you know how frequently during this period the board itself met as a regularly-scheduled matter?"

Then there is some colloquy, and then line 14:

"A I believe monthly."

And on page 54 of the same deposition, line 19:

"Q Could you state approximately how often the

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executive committee did meet during the period, let us say, February 1, 1968 or February 3, 1968 to February 3, 1969, within the year prior to the execution of the agreement with Frequency Electronics?

"A The executive committee usually met within a day or two prior to the full board meeting and sometimes there were special meetings called by me."

That's correct, isn't it?

A I believe I just said that.

Q And in those executive committee meetings and those board meetings you received reports from Mr. Oddi, did you not.

A Among other people.

Q And did Mr. Oddi report to you during that period of time about any negotiations or discussions that he was having with Frequency Electronics?

A You are referring to February '68 to February '69?

Q Well, in the period from July 1968, let us say.

A Yes.

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Q Didn't he keep you fully informed of the talks that he was having with Frequency Electronics?

MR. SCHREIBER: Objection.

THE COURT: Sustained as to form.

Q Did Mr. Oddi inform you of the discussions he was having with Frequency Electronics during this period of time?

A There was some information about it.

Q Were you surprised when the board of directors at Mr. Oddi's request recommended proceeding with the acquisition with Frequency Electroncis?

MR. SCHREIBER: Objection.

THE COURT: I think he means sale to Frequency Electronics. I will overrule the objection. Rephrase the question.

Q That is the question.

A Yes, I was.

Q You were surprised?

A Yes.

THE COURT: You were surprised that he was recommending that National enter into this agreement of sale of February 3rd?

THE WITNESS: Yes.

Q Do you remember when that board meeting was at

which Mr. Oddi proposed that the transaction with Frequency go forward?

A It was not recommended at a board meeting until it had been recommended at various or at least one executive committee meeting prior to the board meeting.

THE COURT: What was it that surprised you?

THE WITNESS: The company had based such high hopes, speaking for myself, I certainly had based great hopes that this relatively little company had poured such huge amounts of capital into developing a product line which could have made the company,at least we believed, an enormously successful business, and for us, we had a multimillion dollar investment in it and to depart from that avenue and to sell for the enormous loss which we showed on our books, was an unhappy surprise.

Q Mr. Lerner, the fact is that National had never made a profit with the Atomichron line, had it?

A I answered that during the deposition. It would be hard to answer accurately because there were some Atomichron sales during some accounting periods. The Atomichron activity might have been profitable during those periods, but overall, the Atomichron project turned out to be a big loss.

Q Thank you.

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Now I believe you testified that in your first meeting with Mr. Bloch in July 1968 you discussed the subject of patents; is that correct?

A I testified. It was mentioned briefly.

THE COURT: The subject of patents?

MR. GOLDMAN: The subject of patents.

Q What was said about patents?

A Mr. Bloch said he was interested to know our patent position.

Q He was interested to know your patent position?

A Yes.

Q Did he say that he was very interested to know if you had a strong patent position on the atomic frequency standard?

A I don't recall.

Q Didn't he say to you, in words or substance, that his interest in purchasing the Atomichron line was based upon his need to satisfy himself that there was a strong position which National held?

A I don't recall.

Q You don't recall?

A I don't recall.

Q But he might have said that?

A He might have.

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Q Did he ask you anything about Hewlett-Packard during that first meeting in July 1968?

A I believe it was mentioned.

Q It was mentioned?

A I believe it was.

Q You knew who Hewlett-Packard was, didn't you?

A Certainly.

Q You knew they were marketing Atomichrons?

A Not necessarily.

Q You didn't know that?

A Yes, I knew they were marketing Atomichron.

Q I mean atomic frequency standards. Atomichron was National's trademark.

A Yes.

Q Did you not know that they were the largest manufacturer and seller of atomic frequency standards at that time?

A Yes.

Q And in fact, when you and Mr. Bloch discussed Hewlett-Packard, didn't you discuss it in the context of Mr. Bloch's questions about why National hadn't done anything against Hewlett-Packard?

A No.

Q You didn't?

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A I don't recall.

Q You don't recall?

A I don't recall.

Q You might have?

A Possibly.

Q Now, at one of your meetings with Mr. Bloch, Mr. Lerner, at one of those meetings did the subject of the splitting of royalties between Frequency and National come up?

A Not with me.

Q You are positive?

A Positive.

Q At the time that Hewlett-Packard was discussed didn't Bloch say to you that if he bought the Atomichron product line you would want to proceed with a patent infringement action against Hewlett-Packard and did you not say to him that National would have to share in royalties?

A No.

Q You didn't?

A No.

Q Do you know, sir, that there is such a provision in the final agreement?

A Yes.

Q Did you know that that provision was in the final

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agreement before it was signed?

A Yes.

Q And you approved it, didn't you?

A Sure.

Q Now, you testified to two meetings with Mr. Bloch.

A Yes.

Q The second meeting, you say, you have no recollection of.

A I believe I said that I didn't recall anything material or important during that second meeting.

Q Well, do you recall anything about the second meeting?

A I really don't.

Q Nothing at all?

A Nothing of any consequence.

Q Let me submit that the consequences of it is something to be decided by the Court. Do you recall anything at all?

A Possibly a rehash of -- no, I will have to stand by that. I don't recall anything.

Q You had a meeting with Mr. Bloch and you can't remember a thing about it?

A True.

Q In any of the meetings that you had with Mr. Bloch,

did you ever discuss the Zacharias Patent?

A No.

Q You are positive of that?

A I am.

Q Even though you know that there was one meeting at least at which patents were discussed?

A The one meeting to which we refer was the only meeting which got down to anything that was basic or germane to the deal which finally took place.

Q Mr. Lerner, I call your attention to page 49 of the transcript of your deposition taken on April 19, 1972 and I refer you to line 23:

"Q Do you recall Mr. Bloch at any time specifically making reference to the Zacharias Patent in any discussion with you?

"A I don't recall."

Now you testified on your deposition in April 1972 that you couldn't recall whether there was a discussion involving the Zacharias Patent. Are you certain today that there was no such discussion?

A Mr. Goldman, perhaps as a matter of semantics, a discussion or a mention to me means something very different. You are asking about a discussion. Now, if it helps any, Mr. Bloch may very well have referred to

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the Zacharias Patent which I knew existed but I don't know any more about it today than I did then.

Q He may have referred to the Zacharias Patent?

A He may have.

Q How did you know it existed?

A I had heard it. Zacharias himself, back in the late '50s, when perhaps Guterman was chairman of the board for five or six years, or from Oddi, or Horner. It had been around for a long time.

THE COURT: Did the company pay for that patent?

THE WITNESS: The company had an arrangement with Zacharias when he came to the board and shortly after he was on the board it made a deal with Zacharias whereby he would steer the course of Atomichron development for the company, and there was a royalty arrangement then and a consulting fee. I don't know exactly what it was. It wasn't a lot in money but was all geared to a lot of money to him one day if the whole project developed to the extent that there were hopes for it.

Q He was pretty essential to the project, wasn't he?

A I thought so.

Q And you knew that this patent, which is the subject of our concern here today, was also pretty central

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to the product line, didn't you?

A A lot of things changed from 1956 to 1968.

Q It was central in '56 though, wasn't it?

A I thought so. We were putting a lot of money inside it. It should have been.

Q Now, at any meeting with Mr. Bloch, Mr. Lerner, did you furnish him with any documents or any papers?

A No.

Q You are positive?

A I'm positive.

Q I refer to your deposition of April 19, 1972, page 88. I'm sorry. Page 89:

"Question: Mr. Lerner"--

I am sorry. Line 11.

"Question: Do you recall at any of your meetings with Mr. Bloch ever furnishing him with a memorandum relating to the status of various patents which Frequency was negotiating over the obtaining of?

MR. SCHREIBER: I object to the form of the question. It should be either of the meetings. He has testified to only two.

MR. GOLDMAN: I will accept the question as modified by counsel's objection.

A I don't recall furnishing any paper or papers

to Mr. Bloch."

Then you said today you are positive you didn't furnish Mr. Bloch with any papers. You said in your deposition that you couldn't recall.

Is it possible that you did furnish Mr. Bloch with some papers?

MR. SCHREIBER: I think that's an unfair way of saying it. He didn't say he couldn't recall. He said I don't recall furnishing any paper or papers to Mr. Bloch.

Q Yes, that's what you said.

THE COURT: What is your present recollection?

THE WITNESS: My present recollection is I didn't.

Q Now, I believe you testified on your direct examination that at sometime prior to the Frequency closing, you learned that National was investigating the question of a patent infringement, is that correct?

A I don't recall that.

Q I'm sorry, Mr. Lerner. My notes tell me that you are --

THE COURT: Just ask him a question about facts. He doesn't have to testify about your notes.

Q Mr. Lerner, didn't you testify --

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THE COURT: No. The underlying fact. Not what he testified. The Court heard whever he said this morning. Let's just get the underlying fact and see if it is so or not so.

Q Prior to the closing with Frequency in February 1969, did you learn from anyone at National that Hewlett-Packard may have been infringing National's patents with regard to the Atomichron product?

A I believe I did.

Q You did learn of that?

A I believe so.

Q Can you tell me the circumstances under which you learned that? Who told you about it?

A I can't say exactly who. However, most likely I would have heard it from one of the operating people.

Q Mr. Drake perhaps?

A Could have been. Could have been Drake, Horner, Oddi, Sweeney.

Q And you learned of that prior to the closing of the Frequency deal on February 3, 1969.

A Yes.

Q And did you learn of that during the period of the negotiations between National and Frequency?

A I don't know just when I learned of it. It

was prior to the February closing.

Q Was it in the year 1968?

THE COURT: As I understand it, the February 3rd agreement was signed and closed on the same day.

MR. GOLDMAN: That is correct, your Honor.

Q It was in the year '68, Mr. Lerner?

A I'm not sure.

Q Was it a matter of days or months prior to the closing, can you say?

A I am not sure. I can't place it.

Q Nevertheless, prior to the closing, you did know that National was investigating the possibility of a Hewlett-Packard patent infringement?

A No. I didn't say that, I don't think. I said I knew that there was talk about an infringement.

Q There was talk about an infringement.

A There was talk that there may have been a possible infringement.

THE COURT: Putting it a little differently, you understand at all times during '68, didn't you, that Hewlett-Packard was meeting the device which was substantially identical to your device, your company's device?

THE WITNESS: Yes.

THE COURT: And selling it?

THE WITNESS: Yes, sir.

Q Did you mention to Mr. Bloch that Hewlett-Packard might have been infringing the Atomichron?

A No.

Q You didn't?

A No.

Q Mr. Bloch ever ask you --

THE COURT: Let's not get off on a trade name here. Th-re is no argument on the trade name. Let's stick with Zacharias.

Q Did Mr. Bloch ever ask you if you had any knowledge about the question of Hewlett-Packard's infringement?

A I don't recall.

Q Now, Mr. Lerner, you testified that in or about April 19, 1970 you purported to acquire the two promissory notes which Frequency gave for the purchase price in this transaction with National, correct?

A Yes.

Q And you say you paid $323,000 for the two notes, correct?

THE COURT: No more questions like that. I heard exactly what he said. No more questions about what he testified to before. Ask him ultimate questions

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about ultimate facts.

MR. GOLDMAN: All right, your Honor.

Q Mr. Lerner, how was the figure of $323,000 for the valuation of these two notes arrived at between you and National?

A In disucssions with Mr. Horner, Drake, probably Sweeney. And you asked me how did we get to that price.

Q I will accept the answer of with whom you discussed it?

A And I would like to make an addition, and William Maxin who was a director of National Radio and who at that time was president of Maxin Electronics.

Q Were you as an individual represented by counsel at that time?

A No.

MR. SCHREIBER: In those discussions?

MR. GOLDMAN: In those discussions.

THE WITNESS: No.

Q You weren't?

A No.

Q Was National Radio Company?

A House counsel was there. I don't know that house counsel was representing the company or representing

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me, but house counsel Drake was certainly aware of what was going on and what we were going to do.

Q Was Mr. Bilodeau involved in those negotiations in any way?

A I believe he was not.

Q Was his firm?

A Perhaps -- I believe not. Not during the discussions.

Q Now prior to April 19, 1970, did you learn that Frequency Electronics had made an offer to purchase the two notes?

A Yes?

Q When did you learn that?

A I think in the early winter months. Perhaps in November of December of '69.

THE COURT: How is this relevant?

MR. GOLDMAN: Your Honor --

THE COURT: I assume if they made an offer to purchase the notes, that the chairman of the board of National would know about it.

MR. GOLDMAN: Well, your Honor, what we are going to try to show and what I think we can show is that Frequency attempted to purchase the notes, made a firm offer at a price which was substantial, at least

substantially as good as the figure which Mr. Lerner acquired the notes for, and that Mr. Lerner rejected the Frequency offer and purchased the notes himself.

THE COURT: Wouldn't that be stipulated? How much was it offered by Frequency?

MR. GOLDMAN: That was going to be my next question.

MR. SCHREIBER: We'll stipulate the facts.

THE COURT: All right, let's stipulate that.

MR. SCHREIBER: We'll not stipulate as to whether it was at least as good. We'll stipulate the facts.

THE COURT: How much was it?

MR. GOLDMAN: I can stipulate to the figure, your Honor. Frequency offered, in November of 1969, to acquire the two notes for $330,000 cash and a $25,000-five year promissory note.

MR. SCHREIBER: Uninterest-bearing.

MR.SCHREIBER: Thank you.

THE COURT: You see, I will take that as conceded assuming it be the fact. I don't want to prolong this trial with a side issue.

MR. SCHREIBER: It is not quite correct.

In the interim there was a $30,000 principal

payment on the account of $325,000 note.

THE COURT: You don't dispute that?

MR. GOLDMAN: No,your Honor, but also, if we are pointing that out, I might say that the $200,000 note which matured in August of 1970 was five or six months closer to maturity as well.

MR. SCHREIBER: That is a passage of time. We cannot dispute it.

THE COURT: What does Mr. Carr want to say?

MR. CARR: I want to say that the offer, as the documents have shown, and as I would propose that Frequency offered to buy not only the notes but also whatever National had in the purchase agreement, namely, National had reserved to itself. You see, I haven't figured out what the relevance is. It might be that you could show me the minority shareholders of National were victims of some sort of self-dealing where a controlling shareholder bought a corporate seat, but I don't think that's germane to this litigation at all. They didn't have to sell it to you.

MR. GOLDMAN: Your Honor, I will pass it.

THE COURT: It is not in dispute, is it?

MR. GOLDMAN: The facts, as we have discussed them, aren't in dispute. The inference is that the Court

is free --

THE COURT: What inference would you want me to draw? If he hadn't offered to sell the notes to Frequency and he caused the corporation to reject them and he bought them himself --

MR. GOLDMAN: The inference is that Mr. Lerner was more concerned with his own personal well-being at that time than that of the company's, and that that is reflective of the transactions which took place between the plaintiff and Mr. Lerner in this case.

THE COURT: I think that's an inference which you couldn't draw. Assuming that he engaged in a self-dealing transaction with National, I don't think that that can be received by me as bearing on credibility or bearing or justifying any interence of fraud or misrepresentation in his dealings with your client in 1968.

MR. GOLDMAN: How about the question of whether he acquired the notes in good faith with the exception of a holder in due course, your Honor?

THE COURT: That will depend primarily on his notice in this case. I gather there is no dispute that he paid a substantial amount of money for those.

MR. GOLDMAN: Well, I think there is another point to be brought out on that.

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THE COURT: You can bring those points out, but this other transaction, I take it, is fully stipulated to now and I regard it as irrelevant.

MR. SCHREIBER: I wouldn't want to belabor it, but I think there are other distinctions between what they wanted to buy and what they in fact bought. He didn't get the royalty, Mr. Lerner didn't get the participation fromany possible patent infringement proceeds when he bought the note, whereas their offer was conditioned upon receipt of both of these items.

THE COURT: I don't think it would be relevant if it was equal or better.

MR. GOLDMAN: Except Mr. Lerner testified previously that his offer was substantially better.

THE COURT: Well, that's his opinion. All right. It is irrelevant to this lawsuit.

MR. GOLDMAN: Your Honor, we'll proceed.

Q Now, at the time you purchased these two notes, or acquired these two notes, Mr. Lerner, there was an outstanding loan, wasn't there, from the Middlesex Bank to National Radio Company?

A There was.

Q And at or about that time that loan was around $270,000, is that correct?

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A That is correct.

Q Now, what was National's financial condition at that time?

A Not very liquid.

Q In fact, they weren't at that time in a position to repay that loan, isn't that correct?

A No, that is not correct.

Q They were in a position to repay the loan?

A When I bought the notes they were.

Q I am sorry. Prior to your purchase and acquiring of the notes.

THE COURT: What date?

MR. GOLDMAN: Prior to April 19, 1970.

THE COURT: You will concede that, won't you?

MR. CARR: I don't know what date prior to that date he is talking about.

THE COURT: One day prior.

MR. SCHREIBER: We'll concede it one day prior but we're not in a position to concede anything else.

THE COURT: All right.

Q Now, do you recall, Mr. Lerner, whether the $270,000 note was due at the bank in or about March of 1970?

A There was such a loan outstanding at or about that time.

Q And did National Radio Company request the bank to renew that loan in March of 1970?

A I believe there was a renewal. I don't know exactly when the renewal date was.

MR. SCHREIBER: The documents are available, your HOnor.

THE COURT: Yes.

MR. CARR: Your Honor, there is a deposition of the Middlesex Bank, there is extensive documentation.

THE COURT: You see, there has to be some reasonable cross examination to show this witness' familiarity with corporate transactions but the fact of the renewal of the note is in Paragraph 21 of the pre-trial order.

MR. GOLDMAN: Your Honor, I am getting to something which I think I can get to right away.

THE COURT: All right, let's get to it.

Q In negotiating for the renewal of the note, Mr. Lerner, were you requested by the Middlesex Bank to write a letter to the bank?

A I wrote such a letter. To answer your question directly, I don't know whether it was their idea or mine.

Q Let me hand you Exhibit 28 for identification and I ask you if you wrote that letter.

THE COURT: No question he wrote it. Offer it in evidence.

MR. SCHREIBER: No objection.

MR. GOLDMAN: I am offering it in evidence.

THE COURT: All right, it is received in evidence.

(Plaintiff's Exhibit 28 for identification received in evidence)

xxx

MR. CARR: It is a letter from Mr. Lerner to Middlesex Bank dated March 3, 1970.

Q Now that letter says --

THE COURT: Don't read it. Hand it to the clerk. If you want me to read it I will.

MR. GOLDMAN: Your Honor, I will do that.

THE COURT: Let's move along, please. Let's not try uncontested facts.

MR. GOLDMAN: I am almost finished, your Honor.

THE COURT: All right. What is the question? Frame the next question.

Q The question is, whether Mr. Lerner didn't write that letter at the request of the bank.

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THE COURT: All right. Did you write it at the request of the bank or not?

THE WITNESS: I don't recall.

THE COURT: Do you write this kind of letter when nobody asked you to?

THE WITNESS: Oh, I probably could have suggested it. But I would just as soon answer yes. I don't think it is important to me. I will say yes, the bank asked me to give it some reasonable assurance that they were going to get their money back, okay?

Q Thank you.

MR. GOLDMAN: May I have one minute, your Honor, to consult with my co-counsel?

THE COURT: Certainly.

(Pause)

MR. GOLDMAN: Your Honor, I believe I have no further questions.

THE COURT: Mr. Schreiber?

REDIRECT EXAMINATION

BY MR. SCHREIBER:

Q Mr. Lerner, at the time of the National press club meeting, of the overseas press club meeting, was I a director of the company?

THE COURT: You are not on trial, Mr. Schreiber.

I don't see what possible difference it makes.

MR. SCHREIBER: I just wanted to show that I didn't attend in the capacity of an attorney.

THE COURT: I don't think any connection is made with respect to your attendance, is there?

MR. SCHREIBER: Mr. Bilodeau was clerk of the company at the time.

Q Wasn't he?

A Yes.

MR. GOLDMAN: I don't recall whether the letter of March 1, 1971 has been introduced into evidence.

THE COURT: What number?

MR. GOLDMAN: That is Defendants' Exhibit 83 -- Plaintiff's Exhibit 83.

THE COURT: Yes, I received that.

MR. GOLDMAN: Thank you,your Honor.

THE COURT: As Exhibit 83. All right, is he excused.

MR. SCHREIBER: Yes,sir.

MR. GOLDMAN: Yes, sir.

(Witness excused)

MR. SCHREIBER: May I approach the bench, your Honor?

THE COURT: With your adversary.

MR. SCHREIBER: I have a number of exhibits which I want to offer and I have a number of questions and answers from various transcripts that I would like to read into the record, and I would just like guidance from the Court if I may as to how you wouldlike the transcripts.

THE COURT: I think I would like to do this. Mark them as exhibits, those pages which you are offering, and give me a general statement on the record of what they are offered to show so that your adversary will know where you are going and so will the Court, but as far as reading depositions at length in a non-jury trial, there is just no point to it. It is an awful waste.

MR. SCHREIBER: I was hoping your Honor would save us all the time.

THE COURT: Tell us what you are offering and what pages and why, what you are trying to prove by it so that everyone knows where you are going.

Any exhibits which are in the pre-trial order that either side hasn't offered, of course, they may do so at any time.

MR. SCHREIBER: Thank you, your Honor.

THE COURT: You may continue, Mr. Schreiber.

MR. SCHREIBER: The defendant Lerner would offer in evidence Exhibits 4, 6, 20, 21, 30, 47, 50, 51, 52

and 53.

MR. GOLDMAN: Your Honor, I would have to check to see which of those are objected to and then have a moment.

THE COURT: Let's take them one at a time. You are offering these as Defendants' exhibits.

MR. SCHREIBER: I am, sir.

THE COURT: Which ones?

MR. SCHREIBER: 4.

MR. GOLDMAN: No objection.

THE COURT: If there is no objection to 4, it will be received and renumbered.

(Plaintiff's Exhibit 4 for identification is now Defendant's Exhibit U received in evidence)

xxxx

MR. CARR: Could we ask a question off the record as to the status of a particular exhibit?

THE COURT: YOu can, but the best source for that is the clerk.

(Discussion held off the record)

MR. SCHREIBER: The next one we would offer is 20.

THE COURT: That has already been marked, hasn't it, as Exhibit Q or R?

MR. GOLDMAN: Your Honor, again --

THE COURT: What number do we have on it?

MR. SCHREIBER: 20 has not been marked in evidence as yet.

MR. GOLDMAN: It is part of that clipped thing, your Honor, the note, the assignment, and the back when we had that discussion.

THE COURT: All right. I think that that makes it Q, doesn't it? Won't you hand me the original, please? Q is the same as 20 except Q is the original, is that right?

MR. CARR: That is correct.

THE COURT: Is there any need for offering the copy?

MR. CARR: No.

MR. GOLDMAN: May I read into the record one thing on the original note? No, I don't need to. I am sorry.

THE COURT: Let Mr. Schreiber finish his offer if you don't mind. There is no need to take 20 in evidence having already received the original as Q.

MR. SCHREIBER: If I may see 20 for a moment, your Honor. I am not quite sure that that is so.

Your Honor, 20 is an assignment from National to Middlesex which is different from Q.

THE COURT: Let me see it, please.

MR. SCHREIBER: Which is an assignement from National to Lerner.

MR. GOLDMAN: That one is in already also.

MR. CARR: Q is No. 13. Q should be related to 13.

THE COURT: I beg your pardon?

MR. GOLDMAN: That is correct.

MR. CARR: Q is 13. I would like 20 in, if I may, your Honor.

THE COURT: Is there any objection to No. 20?

MR. GOLDMAN: No objection to 20, your Honor, except I didn't offer 20, your Honor.

MR. SCHREIBER: No, it hasn't gone in.

THE COURT: Not yet you didn't.

MR. GOLDMAN: I have no objection.

THE COURT: Received.

(Plaintiff's Exhibit 20 received in evidence as Defendants' Exhibit V)

xxx

MR. SCHREIBER: We offer 21 in evidence.

MR. GOLDMAN: No objection.

(Plaintiff's Exhibit 21 marked Defendants' Exhibit W in evidence)

xxx

MR. SCHREIBER: We offer Plaintiff's Exhibit 30.

MR. GOLDMAN: No objection.

THE COURT: What is that offered to show, please?

MR. SCHREIBER: Approval by the board of directors of the transfer of the notes to Mr. Lerner.

THE COURT: All right.

(Plaintiff's Exhibit 30 received in evidence as Defendants' Exhibit X)

xxx

MR. SCHREIBER: Plaintiff's Exhibit 47.

MR. GOLDMAN: No objection.

(Plaintiff's Exhibit 47 received in evidence as Defendants' Exhibit Y)

xxxx

MR. SCHREIBER: Plaintiff's Exhibit 50 is offered in evidence.

MR. GOLDMAN: I have no objection to that, your Honor. I don't know that it is relevant but I won't object if the other side wants it. Perhaps I should ask what they are attempting to show by that.

THE COURT: I think I may have figured it out but at the risk of being wrong I will stay silent.

What is it offered to show?

MR. SCHREIBER: The trend of prosecution of the claim against Hewlett-Packard.

THE COURT: The what?

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MR. SCHREIBER: The development of the prosecution of the claim against Hewlett-Packard.

MR. CARR: Simply stated, your Honor, notice.

THE COURT: I have still missed it.

MR. GOLDMAN: I have no objection, if your Honor please.

THE COURT: Received in evidence.

(Plaintiff's Exhibit 50 received in evidence as Defendants' Exhibit Z)

xxxx

MR. SCHREIBER: 51.

THE COURT: You see, I could see a different purpose for it but I don't understand the stated purpose. Hand me Z, please.

MR. GOLDMAN: Your Honor, on 51 I would not object to it solely for the purpose of showing that it was sent and received.

MR. SCHREIBER: These letters recall his signature. I am speaking of 50 through 53, and have a bearing on the importance or lack of importance of the Zacharias patent.

THE COURT: They wouldn't be very informative to me on that point because they are all matters which took place after the parties had entered into the February 3, 1969 agreement. They are the expressions of opinion

of Hewlett-Packard and of Mr. Lyon respectively later on, at a later point in time.

MR. GOLDMAN: That's why I said, your Honor, I wouldn't object; solely to show they were sent and recieved.

THE COURT: Let's talk about 51 for a moment, Mr. Schreiber. What is the purpose of the offer?

MR. SCHREIBER: Mr. Carr tells me that there are later letters from Lyon, prior letters from Clarence Lyon, which would in a package, bear on the importance of the Zacharias Patent.

MR. GOLDMAN: Your Honor, I don't know what letters counsel is talking about. It is hard to assess his statements.

THE COURT: You see, the pre-trial order agrees that 51 may come in and I suppose I should honor the proceedings before the Magistrate in order for them to have any meaning, but I must say that I am not sure that expressions in these letters subsequent to the transaction are binding on anybody not a party to the letters for purposes of this lawsuit.

MR. GOLDMAN: Your Honor, the pre-trial order, I believe, states that no documents listed are admitted until the party offers them and then at that time the other

party can raise objection. I thought that was --

MR. SCHREIBER: The preliminary language indicates --

THE COURT: Yes, it is quite the contrary. And this is our customary practice: "It is agreed between plaintiff and defendant that any of the exhibits listed are not objected to by either party" -- and by that he means in the order -- "may be introduced by either party, and no exhibit herein described shall be deemed in evidence unless offered by either party."

Now, I will take them for what they are worth.

51 through what?

MR. SCHREIBER: 53, sir.

THE COURT: All right.

(Plaintiff's Exhibit 51 received in evidence as Defendants' Exhibit AA)

(Plaintiff's Exhibit 52 received in evidence as Defendants' Exhibit AB)

(Plaintiff's Exhibit 53 received in evidence as Defendants' Exhibit AC)

MR. GOLDMAN: Your Honor, at this point may I point out that there was a series of exhibits which I had suggested introducing yesterday and the Court

requested that it be deferred.

THE COURT: I will come back to you. Let Mr. Schreiber finish and then I will take whatever you have to offer.

MR. SCHREIBER: We're through with the exhibits your Honor, and we are now turning to the transcript.

THE COURT: Before you go to the transcript, I think that Mr. Goldman wants to take up some exhibits with me.

Do you want to be heard, Mr. Carr?

MR. CARR: I just want to get the letters from the clerk?

THE COURT: What do you want to offer that hasn't been offered already?

MR. GOLDMAN: Your Honor, 55 through 60, which relate to the publicity surrounding the press conference.

THE COURT: What is that offered to show?

MR. GOLDMAN: It is offered to show that it was widely known by National and by the people at National that these products had been sold and that they were being trumpeted to the word at the time, and shortly thereafter the inventors and the company represented to the

Patent Office that there had been no prior public issue or sale.

THE COURT: They all refer to National in them, do they?

MR. GOLDMAN: Yes.

THE COURT: All right, I will take them for what they are worth, 55 through 60.

(Plaintiff's Exhibit 55 through 60 received in evidence)

xxxx

THE COURT: Anything else, Mr. Goldman?

MR. GOLDMAN: No, sir.

THE COURT: Perhaps you would like to break for lunch and come back around 2:15.

MR. SCHREIBER: That would be good, your Honor.

THE COURT: Perhaps 2:20.

MR. SCHREIBER: That would be very good, your Honor. Thank you, sir.

THE COURT: We will be in recess.

end take

(Luncheon recess)

AFTERNOON SESSION

2:15 p.m.

MR. SCHREIBER: May we call our next witness?

THE COURT: Yes.

FREDERICK L. SWEENEY, JR., called as a witness by the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SCHREIBER:

Q Mr. Sweeney, where do you reside?

A 9 Donald Circle, Andover, Massachusetts.

Q Who called you to come here today?

A Mr. Ed Carr.

Q What was your position in National Company or National Radio Company in July of 1968?

A I was controller.

Q Prior to that time, about how long had you been with the company?

A Since September of 1961.

Q In the controller's office?

A In the accounting office. I was controller from May of '68.

Q What is your education?

A I have a degree in accounting from Bentley College,

in Waltham, Massachusetts.

Q Have you any training in engineering?

A No.

Q When did you first hear of Frequency's interest in purchasing the Atomichron from National?

A Late in 1968.

Q Did you attend the closing of the deal in February of '69?

A No.

Q At any time prior to February of 1969, and going back, let's say, to the beginning of '68, did you ever hear anybody at National question the validity of the Zacharias patent?

A No.

Q Do you know what the Zacharias patent is?

A I believe it relates to the Atomichron product line.

Q Did you ever hear anybody at National in that period discuss whether or not the Atomichron could be made without the Zacharias patent?

A No.

Q Did you ever hear anybody at National in that time discuss possible infringement of the Zacharias patent by the Frequency standard product by Hewlett-Packard?

A No.

Q In that same time frame did you ever see a letter addressed by anybody at National to Hewlett-Packard concerning alleged infringement of the Zacharias patent?

A No.

Q Or of any of the patents having to do with the Atomichron?

A No.

Q Now, going back to that same time frame, let's say from July 1st of 1968 through February 3 of 1969, did you ever have any meeting or discussion with anybody from the Frequency company, Frequency Eletronics?

A No.

Q Had no discussions with them whatsoever about anything?

A None whatsoever.

Q When did you first meet Mr. Bloch?

A This morning.

Q Where?

A In the courtroom right over here.

MR. SCHREIBER: I have no further questions, your Honor.

MR. GOLDMAN: No questions, your Honor.

THE COURT: All right, Mr. Sweeney, you are

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excused.

(Witness excused)

MR. SCHREIBER: May I call Mr. Horner, your Honor.

THE COURT: All right.

R A Y E. H O R N E R, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SCHREIBER:

Q Where do you reside, Mr. Horner?

A 85 East India Road, Boston, Massachusetts.

Q You came here in response to a telephone call fromwhom?

A From Mr. Carr.

Q Mr. Horner, what was your position or whe n did you first come to be employed by National Radio Company?

A It was in June of 1968.

Q June of 1968?

A Yes.

Q In 1968, at any time, were you in Atlantic City at a convention?

A No.

Q In 1968 at any time did you have a meeting with Mr. Bloch?

A Not to my recollection.

THE COURT: Ever, anyplace?

THE WITNESS: There may have been one time when people from Frequency came to Melrose for a look at the equipment. That was the only times.

Q At that time did you have any discussion with Mr. Bloch?

A No discussion, no.

Q Did you say anything to him?

A No, other than the normal greeting and that sort of thing.

Q Did you see what Mr. Bloch did or at least what did you see Mr. Bloch do when he came to National at that time?

A That's hard to recall.

THE COURT: What's the matter?

MR. GOLDMAN: I don't understand the question.

THE COURT: What did he observe Mr. Bloch do? Did he observe him walking around the plant? What did he observe? That's a permissible question.

A The best I can recall, he came up for a meeting,

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and they went to look at the equipment that they were purchasing as part of the transaction.

Q Had no discussion with you?

A No.

Q Let's skip back for a moment.

Prior to your coming to the National Company, what had been your occupation?

A Prior to National, I was general manager of the Magnavox plant in Urbana, Illinois.

Q And before that, sir?

A And before that I was with the General Electric Company for ten years in various managerial spots.

Q If I may go once more behind that, your prior occupation.

A Prior to that I was an officer in the United States Air Force.

Q For how long?

A Twenty-two years active duty.

Q And your terminating rank?

A Colonel.

Q What is your educational background?

A BS in electric engineering and a masters degree in industrial engineering.

Q One again I would ask you, did you ever have

any meeting with Mr. Bloch in Atlantic City?

A No.

THE COURT: Who do you work for now?

THE WITNESS: I am the manager of a real estate complex in Boston.

THE COURT: What is the name of it?

THE WITNESS: Harvard Towers.

THE COURT: Does that have anything to do with Mr. Lerner?

THE WITNESS: No. The managing agents are Berrenson Corporation.

Q Have you any business relationship of any kind with Mr. Lerner?

A No.

Q I bring you back to the period, say, between July 1st of '68 and February 3rd of '69, the later date being the date at which the National-Frequency transaction was closed.

By the way, were you at that closing?

A Yes.

Q What did you do there?

A Well, at that closing, there was a mechanical signing of papers.

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THE COURT: Wasn't Mr. Bloch at the closing?

THE WITNESS: No.

MR. GOLDMAN: No, your Honor, he was not.

THE COURT: The witness has answered.

MR. GOLDMAN: We will stipulate that he was not.

Q Did you do anything other than the mechanical signing of the papers?

A No.

Q Did you have anything to do with the negotiations leading up to the agreement that you signed that day?

A None.

Q Did you have anything to do with the drafting of the agreement that was signed that day?

A No.

Q Did you ever have any negotiations with anybody from Frequency Electronics about anything?

A No.

Q Do you know Mr. Lazar of Frequency Electronics?

A No.

Q Now, Mr. Horner, if I may continue as to this time frame of July 1, 1968 up to the closing date, February 3, 1969, in that period did you have any discussion with anybody at National concerning the validity or invalidity

of the Zacharias patent?

A Not to my recollection.

Q Or concerning the validity or invalidity of any of the patents having to do with the Atomichron?

A Not to my recollection.

Q Did you have any discussion in that time frame with anybody at National concerning the need to use the Zacharias patent for the production of the Atomichron?

A Not to my recollection.

Q Did you have any discussion with anybody at National in that time frame with regard to possible infringement by Hewlett-Packard of the National patents and more particularly of the Zacharias patent?

A Not to my recollection.

Q Did you ever see a letter in that time frame, July 1, '68 through February 3, 1969, written by anybody at National to Hewlett-Packard on any subject whatsoever?

A Not to my recollection.

Q And more specifically on the subject matter of possible infringement by Hewlett-Packard of the Zacharias patent.

A Not to my recollection.

Q Or of any other patents having to do with the Atomichron?

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A Not to my recollection.

Q Did you ever sign any such letter?

A Not to my recollection.

Q Did you ever hand a copy of any such letter to anybody?

A No, not to my recollection.

Q And I believe you said you never had met Mr. Lazar.

A Never met him.

THE COURT: Were you hear yesterday?

THE WITNESS: No, sir.

Q Now, keeping within that time frame, July 1, 1968 through February 3, 1969, with whom did you have any discussions, with whom of the Frequency management or representing Frequency did you have any discussions?

A No one to my recollection.

Q Did you ever hear anybody at National say that it was essential to the commercial success of the Atomichron that Hewlett-Packard be stopped from production --

MR. GOLDMAN: Objection to the form of the question, your Honor. It's leading.

THE COURT: Overruled.

A Not to my recollection, no.

Q Did you ever hear of anybody at National, prior

to February 3, 1969, say that it would be essential to go after Hewlett-Packard and make them pay a royalty if they were going to produce a cesium beam frequency standard, that is pay a royalty to National?

A Not to my recollection, no.

MR. SCHREIBER: May I have just a moment, your Honor?

THE COURT: Certainly.

(Pause)

MR. SCHREIBER: No further questions, your Honor.

THE COURT: Mr. Goldman?

MR. GOLDMAN: May I have ten seconds, your Honor, to collect my materials? And also I believe that the Court has, as an exhibit, for identification, a copy of Mr. Horner's deposition which was given in this matter -- either the Court or the clerk.

THE COURT: I have Mr. Horner's deposition.

MR. GOLDMAN: May I just have a quick look at it, your Honor?

THE COURT: Yes.

(Pause)

THE COURT: You are the individual who signed this Exhibit 1, as I understand it.

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(Handing)

THE WITNESS: Those are my initials on it, yes, sir.

THE COURT: Would you look at the signature on it?

THE WITNESS: Yes, sir.

THE COURT: You did?

THE WITNESS: Yes, sir.

MR. CARR: Defendants' Exhibit A bears Mr. Horner's signature too.

THE COURT: A bears his signature.

MR. CARR: It should be on the reverse side, your Honor. There is no issue as to the authentication.

THE COURT: I understand that.

MR. CARR: Thank you.

CROSS EXAMINATION

BY MR. GOLDMAN:

Q Mr. Horner, do you recall giving a deposition in this case in Boston, Massachusetts, on or about November 27, 1974?

A Yes.

Q I call your attention, Mr. Horner, to Page 62. It is an unnumbered page. I'm sorry. At the bottom of the page.

"Question: --

THE COURT: Do you recall being asked this question and giving this answer.

Read the question and read the answer.

Q Do you recall hearing this question and giving the answer which I will recite thereafter, Mr. Horner:

"Question: Were you aware at that time, referring to the period of September 1968 to February 3, 1969, that Hewlett-Packard did market a product which was in competition with the Atomichron product line?

"Answer: Yes."

Do you recall being asked that question and giving that answer?

A I don't recall it but if I had been asked that would have been the answer.

MR. GOLDMAN: I have no further questions, your Honor.

THE COURT: When did you first see this Exhibit 1 here, Mr. Horner?

THE WITNESS: Ph, probably -- I can't really remember but it was probably a day or two before we went to New York to do the closing.

THE COURT: The original date is December 30th,

would that be it?

THE WITNESS: There were a lot of negotiations going on on that which I was not a party to.

THE COURT: Who was it who was a party to it?

THE WITNESS: Mr. Oddi did the negotiating.

THE COURT: All right. Is there any redirect?

MR. SCHREIBER: No, sir.

THE COURT: All right. You may step down.

MR. SCHREIBER: Thank you, sir.

(Witness excused)

MR. SCHREIBER: Your Honor, we now come to a technical bit of getting in some of the transcript of the depositions.

THE COURT: All right, you may proceed with that. Are you having Mr. Oddi?

MR. SCHREIBER: No, sir.

THE COURT: All right. Who knows what this Paragraph 8 is in this agreement No. 1 from the defendants point of view?

You see, you have just given us a witness who apparently saw it the day of the closing and he signed it. He didn't negotiate it and he didn't draw it. But the

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inference that the Court would ordinarily reach from Paragraph 8 is that the parties to this agreement of February 3, 1969 thought that there were causes of actions in favor of National pending or existing in relation to the Atomichron line including without limitation causes of action for patent infringement, and that the parties agreed that in this Paragraph 8 on how they would proceed with respect to such claims.

From your side of this case you have given us no background from which the Court could determine just what that clause contemplated except such inferences as I might reach just from reading all of the contract.

MR. SCHREIBER: Well, if I may suggest, your Honor, that clause indicated that the parties to that agreement thought that there might be such causes of action and that Clause 8 gave Frequency a discretion as to whether or not to proceed to enforce it. If it chose to, it couldn't enforce it. In which case National would have gotten nothing therefrom.

THE COURT: Did this clause have anything to do with Hewlett-Packard?

MR. SCHREIBER: It has to do generally with any possible infringement, and if there were, Hewlett-Packard claimed that it would go forth within the orbit

of that clause.

However, you will note that the decision to proceed, if there was to be a further step, was that of Frequency alone; and secondly, if it chose to proceed, it would do so at its peril having to pay both the expense and having to bear the risk.

THE COURT: Am I justified in inferring from this agreement alone that both parties thereto believed at the time indicated by the agreement that National had a claim against Hewlett-Packard for infringing the Zacharias patent?

MR. SCHREIBER: I would say not, sir. I think the most you could infer from that is that National might have a claim against anybody at large including Hewlett-Packard -- might have a claim.

THE COURT: That clause got in there for some reason, didn't it?

MR. SCHREIBER: That's right, sir.

THE COURT: Nobody knows why.

MR. GOLDMAN: Your Honor, we have testified to why.

THE COURT: I am just wondering about what they are doing about meeting this contention.

All right, let's take care of these documents

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that you want to mark.

MR. SCHREIBER: Mr. Carr indicated that he would like to respond to your Honor's question if he might.

THE COURT: Evidence is what I am looking for, really, not attorneys' arguments. That you will get a chance to do later.

MR. CARR: Your Honor, Mr. Schreiber has not had the benefit of --

THE COURT: Don't criticize Mr. Schreiber. What is it you want to say?

MR. CARR: I am trying to tell the Court that there were depositions of Mr. Drake and Mr. Oddi, and in these depositions the Court will have evidence of how Paragraph 8 got into the agreement.

THE COURT: Briefly, how do you say it got into the agreement?

MR. CARR: I see it got into the agreement because at sometime in the fall of 1968 the evidence will show that someone at National Company contacted Kenway and Jenney, and it was probably the engineer Clarence Thornberg, after receiving information that possibly a model or some device manufactured by Hewlett-Packard might possibly infringe one of National's patents.

THE COURT: The Zacharias patent?

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MR. CARR: Well, no. The evidence will show, your Honor, that they sent it to the attorneys, Kenway and Jenney, to find out what patents, if any, this particular device it was suggested might possibly infringe the Zacharias patent.

THE COURT: Did Kenway and Jenney respond before February 3rd?

MR. CARR: Yes, and I have a letter which I thought should go along with part of the memorandum, the memorandum of November 14th, which was in effect a transmittal letter for Kenway and Jenney's response.

We have deposed Mr. Lyon.

THE COURT: What year?

MR. CARR: November 14, 1968.

MR. GOLDMAN: Exhibit's Exhibit 46, your Honor. That is the memo we contend was given to us.

THE COURT: Yes, but he said he has a covering letter.

MR. GOLDMAN: There is a covering letter which was attached to the motion for a preliminary injunction which was filed in this court. It is dated November 20, 1968, and it is from the Lyon firm to Mr. Drake, who is the general counsel for National, enclosing the memo.

THE COURT: Which exhibit number is that?

MR. GOLDMAN: Your Honor, it wasn't identified because it is on file and is of course in this case on the motion for a preliminary injunction. It was our understanding under Rule 65 that it became part of the record in the case.

MR. CARR: I am going to offer the affidavit which was identified.

THE COURT: Mark the letter that has just been mentioned. Are you offering it, Mr. Carr?

MR. CARR: Yes.

MR. GOLDMAN: Your Honor, may I take a look at it?

THE COURT: You just told me that you consider it part of the record in the case?

MR. GOLDMAN: I want to see if it is the same letter because I haven't seen it.

(Defendants' Exhibit AD marked for identification)

MR. CARR: And this is an affidavit which has been before the Court and in Mr. Lyon's deposition will be further identification.

(Defendants' Exhibit AE marked for identification)

MR. GOLDMAN: Your Honor, I object to the

affidavit as being evidentiary for the truth of the statements contained therein. It is hearsay. And while it is part of the record, the substance of it is admissible only to the extent it would be admissible at trial.

THE COURT: Well, what do you say about that? What is it offered to show? What is the date of it? It is a '72 affidavit so its existence prior to closing isn't established.

MR. CARR: The affidavit was prepared in connection with the hearing in this court, in connection with an application for a preliminary injunction.

The affidavit was further identified in Mr. Lyon's deposition and adopted in his deposition at which Mr. Goldman was present and was capable and able to cross examine.

THE COURT: It is was adopted in his deposition, you may offer that portion of his deposition in evidence.

MR. GOLDMAN: There was examination on it at the deposition.

MR. CARR: The purpose of it is to establish the time.

THE COURT: The time of what?

MR. CARR: The time of the so-called investigation of the so-called Hewlett-Packard infringement

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of the Zacharias and Mainberger patents and the knowledge at that time prior to the closing of any infringement of the same or any invalidity of the same. And the fact that Mr. Lyon, the patent attorney upon whom National relied, said at that time that they were valid, and that is what National thought, and the whole thing was disclosed to Frequency.

MR. GOLDMAN: There is no testimony to that effect, Mr. Carr.

MR. CARR: I think there is, if you look at all of the documents, that's a proper inference that can be drawn from the facts. That's what we intend to show.

MR. GOLDMAN: Do you concede that the memorandum, Exhibit 46, was given to us? Is that your contention when you say "We were told about it"?

MR. CARR: We're not contending anything. I say that the contention that exactly what is shown in the letter is what is shown in the facts.

TEH COURT: Well, this November 20th letter attached to it, addressed to Mr. Drake, is the same letter as Exhibit AD for identification.

MR. CARR: That is correct, your Honor. It is the same letter.

THE COURT: There is no objection to that?

MR. GOLDMAN: No, your Honor. But there is no proof or evidence that we were ever shown that letter.

THE COURT: Ad is received.

Suppose you were?

MR. GOLDMAN: We would have relied on it. Obviously it says the Zacharias patent was infringed.

THE COURT: You see, unless otherwise explained, Clause 8 of the contract of sale, Exhibit 1, justifies an inference on my part that the parties both believed and understood, at the time they entered into this agreement, that there was an outstanding claim for infringement of the Zacharias patent against Hewlett-Packard.

I think that's the fair inference to be drawn from No. 8 unless otherwise explained.

But the patent they have been talking about all along here is the Hewlett-Packard infringement of Zacharias. There is no evidence anywhere in this case that any other patents were infringed by anybody else.

In the absence of some other evidence, I'm just inquiring from you attorneys whether you deny that that is a reasonable inference. I am trying to make your job easier for you.

Let's go forward. I will note take Exhibit AE

for identification except to the extent that it is included by reference or adopted by the witness in his deposition at which he was cross examined or available for cross examination.

Do you want to start offering the Lyon deposition?

MR. CARR: Yes.

(Defendants' Exhibit AF marked for identification)

THE COURT: In Exhibit AF for identification is Paragraph 8 identical with the final?

MR. CARR: The question, your Honor, is, is it identical to the final?

THE COURT: Yes.

MR. CARR: No, there are some changes. There is some testimony in the deposition of Drake where there are some particular differences in Paragraph 8. There is a sentence that is added in Paragraph 8 of the final.

THE COURT: You may go forward with your depositions.

MR. CARR: Starting with the Lyon deposition, your Honor, and with reference to what in that deposition was referred to as Lyon Exhibit 3, which is the Lyon affidavit which we have marked here as AE -- is it the

pleasure of the Court that I read this into the record?

THE COURT: If it is very brief, or, if there is a controversy about it, I will permit you to read it, but I thought before the luncheon recess we had agreed that you would mark the depositions themselves for identification and tell us what pages are being offered.

If there is controversy or if it is critical then I will hear it.

I told you earlier that I wanted you to tell me what it was offered to show so that all of us would know where it is going.

MR. CARR: What we have now is some statements with respect to that Lyon affidavit, Exhibit AE.

MR. GOLDMAN: What page are you on?

MR. CARR: Page 7.

THE COURT: What is the gist of it? What are you offering to show by that?

MR. CARR: I am offering to show that the witness has identified that affidavit, recognizes the affidavit, and adopts the same.

THE COURT: All right. What page numbers?

MR. CARR: Pages 70 and 71 of the Lyon deposition. This Lyon deposition took place March 11, 1974 at Boston.

THE COURT: Mark the book for identification. And that will be received in evidence.

MR. CARR: We have got Lyon 2. There is something in Lyon 2 also.

(Defendants' Exhibits AG and AH marked for identification)

MR. GOLDMAN: Your Honor, as I understand it, the testimony on page 70 and following that Mr. Lyon, signing the affidavit.

THE COURT: It doesn't say that it is true.

MR. GOLDMAN: I don't see anything in that area of the deposition which talks about the substance of the affidavit.

THE COURT: Why don't you offer the whole deposition and I will take it for whatever it shows.

MR. CARR: All right, your Honor.

THE COURT: Give it to the clerk.

MR. CARR: Shall I call the Court's attention to particular pages?

THE COURT: That isn't essential if you will tell me what you are offering it to show besides the fact that you contend that the witness adopts as his testimony everything contained in the affidavit.

You see, even if he didn't, if the affidavit

was called to the attention of the plaintiff and he was available for cross examination, it loses its hearsay aspect once you do that.

MR. CARR: I asked him to identify that document, and my contention is that that was done. The purpose of the substantial -- all of the Lyon deposition has to do with, first of all, the knowledge that he had of the so-called Hewlett-Packard infringement, what he was asked to do, and whether he was asked to do it by way of notice and the status of the condition of the investigation of the alleged infringement by Hewlett-Packard at that time.

THE COURT: He regarded them as a punitive infringer on February 3, 1969, didn't he? I mean Mr. Lyon.

MR. CARR: Mr. Lyon's investigation began apparently before the letter of the 20th of November of 1968 and the testimony is that he was not asked to do any work after that.

Apparently, gathering from what he said, because of the impending sale to Frequency --

THE COURT: But he thought they were infringing.

MR. CARR: His judgment was on a preliminary basis they were.

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THE COURT: And he told that to the client by this transmittal letter, that is correct.

THE COURT: All right.

MR. CARR: There is no doubt about that, your Honor.

THE COURT: Anything else you are trying to prove by that document?

MR. CARR: By the Lyon deposition?

THE COURT: Yes.

MR. CARR: That there is no warranty of patent validity and that there was a discussion between all parties who were instrumental, Mr. Drake, the house counsel, Mr. Lyon, the patent counsel, and as to the language of the grant and conveyance, and that the grant and the conveyance was in the form of what might in a shorthand way be called a quit claim, and there was no grant or representation of anything.

Further, that the participation in any of the infringement suits or actions involving the Zacharias patent or Mainberger patent were at Frequency's own risk, that they were appraised at the status of the particular status at that time.

Mr. Lyon testifies in his deposition that there is in his own, in his firm or in his own way of

investigation, a two stage investigation.

First of all, a preliminary investigation to determine whether or not the article itself is infringing, and after that, after that passes, this preliminary investigation, then an indepth study to determine whether or not there is enough evidence, the patent is of enough strength and such other things as may be appropriate to make a final decision as to the ultimate action against the infringer.

His deposition also shows that it was -- that Frequency then came back to him to do the second stage, to make the final demand letter to Hewlett-Packard and that final demand letter came through sometime in 1970 and I don't believe as yet there is no evidence Mr. Lyon's file which is referred to there, and if we are taking the whole package --

MR. GOLDMAN: Your Honor, I have not objected to anything. Let me say briefly that Mr. Carr's contentions as to what the deposition says and shows is obviously something which --

THE COURT: Its advocacy.

MR. GOLDMAN: Its advocacy and whatever the deposition says it says.

THE COURT: Absolutely. The man is over a

hundred miles away, isn't he?

MR. GOLDMAN: Yes, sir. And we understand he is ill besides.

THE COURT: I am sorry to hear that.

MR. CARR: Yes, he is ill.

MR. GOLDMAN: And your Honor, lastly on the point, to the extent that Mr. Carr talks about what Mr. Lyon's intentions were with respect to the warranty, and so forth, there isn't a smidgen of evidence that those internal discussions at National were ever communicated tous.

THE COURT: It is an integrated agreement that is a parol evidence question, isn't it? But it may have some bearing on the matter, and I will take it for what it is worth.

MR. GOLDMAN: Even beyond the question of parol evidence, they don't allege an agreement between Frequency and National based on Mr. Lyon's intentions.

THE COURT: I take it what they are saying is that in drafting the agreement they intend it to have that effect.

MR. GOLDMAN: Yes.

MR. CARR: As I understand, I was to respond to the Court as to the reasons for offering this. If

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there is any common law fraud, I think it would bear on the issue as to that.

Also important on this issue is what is identified in the Lyon transcript as Lyon Exhibit 4.

THE COURT: What is the number of that in this case?

MR. CARR: It has not been offered in this case.

MR. GOLDMAN: I don't know what this is.

MR. CARR: I think you extracted from Lyon Exhibit 4 certain of the correspondence with Hewlett-Packard. This was produced --

THE COURT: Anything in it that you want to extract, I think you should remove and separately mark, and I will have to consider whether there is any objection.

MR. CARR: I will offer the letter of June 19, 1970.

MR. GOLDMAN: It is a simple demand letter of Hewlett-Packard. I have no objection to it.

THE COURT: I already have the letter from Hewlett-Packard in evidence acknowledging receipt of such letter.

MR. CARR: And referring to that letter, your

Honor.

THE COURT: Received in evidence.

(Defendants' Exhibit AI for identification received in evidence)

THE COURT: All right. Go ahead.

MR. CARR: That's the purpose in offering the Lyon transcript.

THE COURT: All right.

MR. CARR: I have, in addition to that, transcripts from Mr. Oddi, depositions of Mr. Oddi, who is beyond a hundred miles, and transcripts from Mr. Drake.

THE COURT: Let's take them one at a time. What are you trying to show by Oddi?

MR. CARR: I am trying to show by Mr. Oddi his participation in the negotiations, the negotiations with respect to Paragraph 8, with respect to the fact there were no representations of patent validity, with respect to the fact that there was no statement or representation by Frequency or anyone as to the essentiality of being able to eliminate the so-called Hewlett-Packard competition.

Also as to no one from Frequency stating to Mr. Oddi that it was essential that the Zacharias patent was valid or they would not go through with the transaction.

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That was expressly asked and denied. That it was essential that the patents be valid or they would not go through with the transaction.

That was not stated insofar as Mr. Oddi; he was the one who signed the letter agreement; he was theone who met with Mr. Lazar on the 25th of November of 1968. He signed the letter agreement which is dated as of December 30th. And though he didn't sign the purchase and sale agreement on February 3 in New York, he was the one who negotiated the deal, and I think everybody admits to that, and I think, as to the issues of misrepresentations, issues of knowledge, issues of fraud, and whether or not Frequency in fact bought and was told exactly the status of the so-called infringement and that it was at a negotiation or investigation stage, should be shown by Mr. Oddi's deposition.

MR. GOLDMAN: Your Honor, I have a problem with all of these depositions, and that is the parties stipulated, and the ones that Mr. Carr is referring to were depositions taken by him, the parties stipulated that objections except as to form were reserved until the time of the trial.

Now, if these transcripts come in on a wholesale basis, there are obviously portions of it which would be

found objectionable if dealt with specifically.

THE COURT: Perhaps you can give me a typical example or type of ground which you care to assert with respect to Oddi.

I will take your objections with respect to any of these if you will direct my attention to them.

MR. GOLDMAN: I don't think I can make a blanket objection to the blanket deposition. If Mr. Carr has certain portions of the deposition, I realize --

THE COURT: You see, I took the Lyon deposition because of the rather unusual way of going about it. They apparently showed him an affidavit and asked him if that was his signature which I guess is a matter not in dispute. Perhaps you could limit your offer on Oddi to particular pages.

MR. GOLDMAN: Or, your Honor, we could brief it after trial if Mr. Carr wants to offer specific sections.

THE COURT: You see there is a real severe objection here to something that was done on the deposition. It would be good to get it out on the table now because if such is the case, the proponent of the deposition has to have a fair opportunity to deal with the problem.

It might be that Mr. Oddi would suddenly

materialize in Foley Square, New York.

MR. GOLDMAN: I can only say that if I could get a clue as to what section we are talking about --

THE COURT: Would you try to accommodate him?

MR. GOLDMAN: Then I would be prepared to say -- which transcript are you referring to now?

MR. CARR: The Oddi transcript. There is only one volume of Oddi. This is Mr. Oddi's deposition taken on November 27, 1974.

MR. GOLDMAN: I need a moment to get my copy, Mr. Carr.

THE COURT: You see in the old days they used to make people mark these depositions up in blue and red and there was a lot of busy work for lawyers and all the lawyers including myself hated to do that, and we have tried to relax some of these procedures. We don't want to make it a trap for the unweary. If there is something in there that shouldn't come in counsel should know about it before he rests.

MR. GOLDMAN: Your Honor, I'm having trouble locating this transcript. Please bear with me.

THE COURT: Well, let's hear what other transcripts you have and perhaps I will take a recess to

permit you to get together on these things.

MR. GOLDMAN: I would appreciate that, your Honor.

MR. CARR: The other transcript I have is a transcript of Drake, that is E. Whitney Drake, who, at the time is material to the events, was house counsel for National in the Boston area. That was taken in Washington, D.C. where Mr. Drake was employed by the United States government, an organization which we all know about.

THE COURT: I would have to think a minute. Is he in the AO?

MR. CARR: He is in the Navy. He is in the procurement department. He is on the other side of the table, in very short form. He was negotiating with the Navy, and now he is negotiating with contractors. That was taken on December 3, 1974, your Honor.

THE COURT: What is it offered to show?

MR. CARR: I offer to show by Mr. Drake the circumstances of the negotiations between the parties leading up to the final contract, that there was negotiations between an attorney, Mr. Klineman on behalf of Frequency, a skilled attorney and negotiator, and that he negotiated the contract, that in effect there was no substantial discussion as to patent validity, that they knew that this

involved the sale of nineteen different patents, that he had access to patent counsel, he had access to Mr. Lyon if he wanted to have, that the conveyance and patent assignments and the drafting of all matters relating to patents were done by consultation with Mr. Lyon of the Boston patent law firm of Kenway & Jenney, that it should be drawn, an inference can be drawn that Mr. Klineman equally sought aid or assistance as he thought was necessary but there was negotiations between attorneys, an arm's length transaction and the document should be the one that is controlling.

They knew exactly what the situation was.

THE COURT: Don't overburden me with too much argument here.

MR. CARR: It goes to fraud, it goes to --

THE COURT: All right, I understand, of the notice and the time of the infringement, and I think that Mr. Drake's --

THE COURT: All right, Mr. Carr. I understand your position.

Now, tell me please, what else you have besides these two depositions because I am going to give Mr. Goldman a brief opportunity to look at them during a recess. We will have it in a few moments.

MR. CARR: That's it. That is our case.

(Defendants' Exhibit AK marked for identification)

xxx

THE COURT: Is there in evidence anything concerning the relationship between Zacharias and National concerning this patent?

Is there a chain of title as to the patent or is there --

MR. GOLDMAN: There is an admission, which is admitted that Zacharias, Holloway and Grant were employees of National --

THE COURT: Who were Holloway and Grant?

MR. GOLDMAN: They were co-inventors. They were employees of National at the time the application for patent was filed and there was an assignement. That's in a request for admission which I read into the record the other day.

THE COURT: We have Zacharias as a director.

MR. GOLDMAN: Yes, and Mr. Lerner, I believe, identified the other two parties in his deposition, or perhaps that was in the mass case.

MR. CARR: I don't recall the admission. I don't know that he was ever an employee, qua employee. I think he was a consultant, and one of the things that is

set forth in the agreement is that FEI agreed to consume National's obligation to Zacharias under a long-standing royalty payment agreement pursuant to which National paid royalties to Zacharias for the utilization of whatever idea or inventions were contained in that.

THE COURT: We don't have that agreement here however, do we?

MR. CARR: We shipped the files all to Frequency.

MR. GOLDMAN: Your Honor, we do have that agreement. We have a copy of that royalty agreement. Mr. Bloch, I believe, based his testimony the other day, that is, when you asked him what percentage payable to Zacharias was on that-- I have a copy of that agreement which I would offer, your Honor, if you wish to have it.

THE COURT: All right,as soon as counsel has rested I will permit you to offer that. Why don't you take a recess and see if you can come to a reasonable agreement on the depositions. You don't want the Court I am sure to go back to this business or purging depositions and underlining them. That's the worst busy work in the world.

MR. CARR: Your Honor, some of the depositions by way of either procedure or something, I have ended

up with one copy.

THE COURT: You see, our rules require you to file your depositions.

MR. GOLDMAN: Your Honor, I was under the impression that could be waived by consent of the parties.

THE COURT: I suppose plenty of people are waiving it, but you see the Court really expects, particularly in a matter of this sort, to have those depositions sent along. It is not important.

MR. GOLDMAN: I can shortcut it. I have no objection to the depositions going in and being read by the Court for whatever they are worth. I believe that the most critical areas, the objectionable portions that I found during the course of the depositions were raised at that time. If there were some oversights I am sure that the Court can evaluate the significance of the testimony.

THE COURT: Most things that you should object to have no merit anyway so it is immaterial really.

MR. CARR: My problem would be in the sense that I would not have a copy --

THE COURT: Mark them as exhibits and when you submit your post-trial memorandum, which I assume you are going to want to submit, send them with a covering

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letter of transmittal pointing out that they are not to be filed but are to be returned at the conclusion of the litigation.

MR. CARR: In each case here where I have gone over the deposition and marked the points that I would want to submit, I could confer with Mr. Goldman on that and those would be the parts that I would want to offer.

MR. GOLDMAN: It is not necessary. I think that they should go in in total and be evaluated by the Court.

THE COURT: They will be received in evidence as exhibits.

MR. GOLDMAN: Your Honor, I am looking for that consulting agreement with Dr. Zacharias.

THE COURT: All right.

MR. CARR: We have three, I believe. We have Lyon, Oddi and Drake.

(Defendants' Exhibits AJ and AK received in evidence)

THE COURT: You are resting, are you, Mr. Carr?

MR. CARR: If I could just confer with Mr. Schreiber.

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THE COURT: Yes.

(Pause)

MR. CARR: Yes, your Honor, that concludes the case of the defendant Lerner. Thank you, your Honor.

MR. GOLDMAN: Your Honor, I am going to hand up for filing the originals of Mr. Lerner's deposition.

THE COURT: Very well. You see, he has been and has testified and I didn't understand that you were using any part of that other than what you read.

MR. GOLDMAN: I thought you had requested on the first day of trial that you wanted a copy of his transcript.

THE COURT: That's a matter of procedure here but I am not taking it now as part of the record.

MR. GOLDMAN: Then I won't offer it. I have put in what I want from it.

THE COURT: That's what I understood you meant.

Do you have anything else to offer in rebuttal?

MR. GOLDMAN: I have nothing, your Honor. Only Dr. Zacharias' agreement which I will find in a moment.

THE COURT: All right.

MR CARR: Could we have a copy of that agreement?

MR. GOLDMAN: I have no xerox copy. Can we file it by letter to the Court?

THE COURT: I would like to mark it as an exhibit so that they can see what I am marking.

Mr. Goldman, I will reserve an exhibit number for that agreement with the understanding that as soon as you locate it you will send a xerox copy of it to Mr. Schreiber and if the receipt of it by him poses any problem of admissibility, or genuineness, or authenticity or anything like that, immediately upon receiving it he may respond to the Court and while I certainly would hope I wouldn't have to do it, if it becomes necessary to protect anybody's rights I will reopen the hearing for that limited purpose.

MR. GOLDMAN: Your Honor, I just found it.

THE COURT: All right, show it to Mr. Carr. Mark it for identification first.

(Plaintiff's Exhibit 85 marked for identification)

MR. GOLDMAN: Your Honor, some question has arisen as to the form of the pages. Mr. Bloch is here in court. With the Court's permission we can confer with him for one moment and see if we can avoid all objections to the document.

THE COURT: All right, why don't you confer with Mr. Bloch. I will take a brief recess. Anyone who doesn't have to actually participate in the conference with Mr. Bloch, perhaps it would be possible, Mr. Ebenstein for you to take care of that.

MR. EBENSTEIN: Yes, surely.

THE COURT: And then I can see trial counsel inside.

MR. GOLDMAN: Thank you, your Honor.

THE COURT: You are resting subject to receipt of that document.

MR. GOLDMAN: Yes, and subject to filing post-trial briefs with the Court's permission.

THE COURT: Yes.

(Discussion held in chambers off the record)

(Plaintiff's Exhibit 85 for identification received in evidence)

(Defendants' Exhibit M for identification received in evidence)

(Trial concluded.)

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